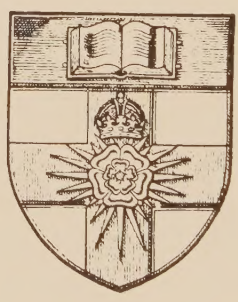
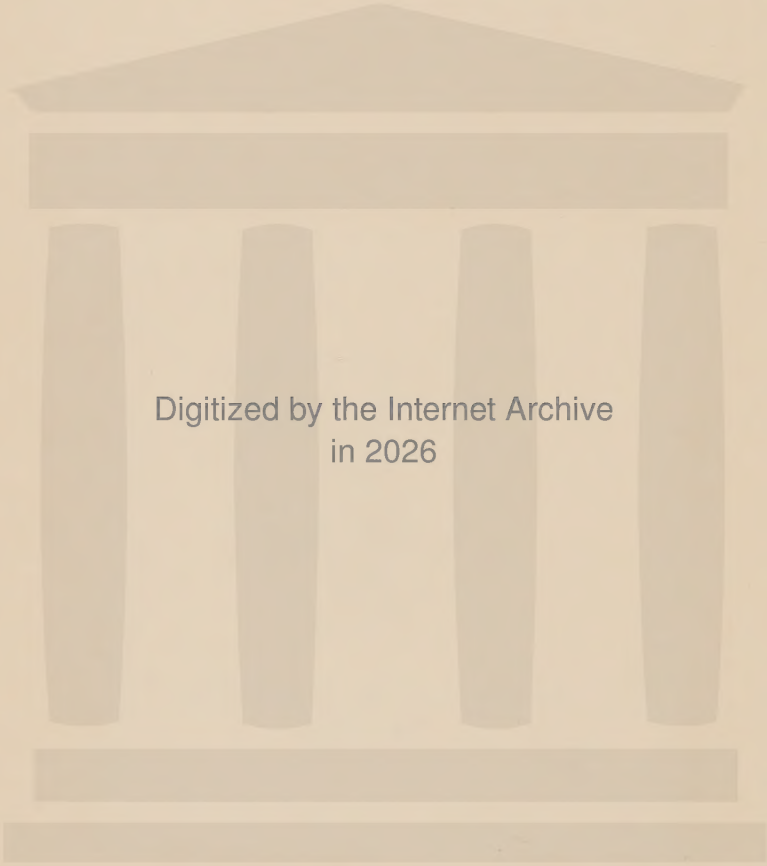
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

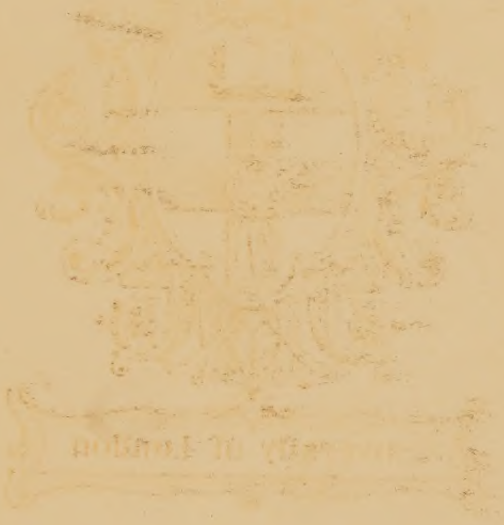
346.4
Mx. North



UNIVERSITY OF LONDON
LIBRARY


Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1909_2



THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Sir William S. Robson, M.P. . . Attorney-General.
Sir Samuel T. Evans, M.P. . . . Solicitor-General.
William H. Winterbotham, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. J. Eldon Bankes, Esq., K.C.	Inner Temple.
J. M. Astbury, Esq., K.C., M.P. C. C. Scott, Esq.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C.	Gray's Inn.
W. English Harrison, Esq., K.C., of the Middle Temple. Robert F. Norton, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
Sir John Hollams (Firm—Messrs. Hollams, Sons, Coward & Hawksley). W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1909.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal . . .	EDMUND LUMLEY, W. J. BROOKS,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases .	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, W. H. GRIFFITH, W. F. BARRY,	*Barristers-at-Law.*
Bankruptcy Cases . . .	H. L. FRASER,	*Barrister-at-Law.*

1909.—VOL. II.

LONDON:

Printed for the Council of Law Reporting

BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,

And Published

BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL. LONDON UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1909.

Lord Loreburn, Lord Chancellor.

Lord Alverstone, Lord Chief Justice of England.

Sir H. H. Cozens-Hardy	Master of the Rolls.
Sir John Charles Bigham,	President of the Probate, Divorce, and Admiralty Division.
Sir Roland Vaughan Williams, Sir J. Fletcher Moulton, Sir George Farwell, Sir H. B. Buckley, Sir W. R. Kennedy,	Lords Justices of the Court of Appeal.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1909.

The Right Hon. Lord Alverstone, Lord Chief Justice of England, President.
The Hon. Sir William Grantham, Knt.
The Hon. Sir John Compton Lawrance, Knt.
The Hon. Sir Edward Ridley, Knt.
The Hon. Sir Charles John Darling, Knt.
The Hon. Sir Arthur Moseley Channell, Knt.
The Hon. Sir Walter George Frank Phillimore, Bart.
The Hon. Sir Thomas Townsend Bucknill, Knt.
The Hon. Sir Joseph Walton, Knt.
The Hon. Sir Arthur Richard Jelf, Knt.
The Hon. Sir Reginald More Bray, Knt.
The Hon. Sir Alfred Tristram Lawrence, Knt.
The Hon. Sir Henry Sutton, Knt.
The Hon. Sir William Pickford, Knt.
The Hon. Lord Coleridge.
The Hon. Sir John Andrew Hamilton, Knt.

ATTORNEY-GENERAL:

Sir William S. Robson, Knt.

SOLICITOR-GENERAL:

Sir Samuel T. Evans, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
391	6 from bottom	*Mrs. Benson*	*Mrs. Bishop.*
592	footnote (1), add [1909] 1 Ch. 149.		
833	footnote (2)	add 9 Q. B. D. 337.	
839	,, (1)		

[1909] 1 K. B.

954	8	at	in.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows:—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Arlidge *v.* Islington Corporation	127
Ashmore, Ex parte. In re Drummond	622
Attorney-General *v.* Clark	7

B.

	PAGE
Bailey *v.* Barsby	610
"Bainbridge" (Owners of S.S.), Devitt *v.* (C. A.)	802
Barry Railway Company, Great Western Railway Company *v.* (C. A.)	670
Barsby, Bailey *v.*	610
Barton, In re. Tomlins *v.* Latimer (C. A.)	841
Bender *v.* "Zent" (Owners of S.S.) (C. A.)	41
Benoist, In re	784
Benstead, Stowe *v.*	415
Bill Posting (Provincial) Company *v.* Low Moor Iron Company (C. A.)	344
Birkin *v.* Smith (C. A.)	112
Bishop, Howes *v.* (C. A.)	390
Black & Co., Curtis *v.* (C. A.)	529
Blaenclydach Colliery Company, Eaves *v.* (C. A.)	73
Board of Education, Rex *v.*	1045
Booth *v.* Walkden Spinning and Manufacturing Company	368
Boots, Charing Cross, Euston and Hampstead Railway Company *v.* (C. A.)	640
Bottomley, Ex parte	14
Brewery (Lion) Company, Smith *v.* (C. A.)	912
Brice *v.* Edward Lloyd, Ld. (C. A.)	804
Bristol Gas Company and Bristol Tramways and Carriage Company, In re	297
Bristol Tramways and Carriage Company and Bristol Gas Company, In re	297
Britannic Merthyr Coal Company, David *v.* (C. A.)	146
Bromley *v.* Smith	235
Brooks, Kershaw *v.*	265
Brown, Dean *v.* (C. A.)	573
Burr *v.* Smith (C. A.)	306
Burton *v.* Hudson	564

C.

PAGE

Calico Printers' Association, Shirt *v.* (C. A.) 51
Carne, Marks *v.* (C. A.) 516
Cartwright *v.* Shrewsbury Town Clerk 169
Charing Cross, Euston and Hampstead Railway Company *v.* Boots (C. A.) 640
Child *v.* Edwards 753
Ching *v.* Surrey County Council 762
Chislett *v.* Macbeth & Co. 36
——— *v.* ——— (C. A.) 811
Chitson, Rex *v.* (C. C. A.) 945
Clark, Attorney-General *v.* 7
Clarke *v.* West Ham Corporation (C. A.) 858
Clover, Clayton & Co., Ld., Hughes *v.* (C. A.) 798
Coal (Britannic Merthyr) Company, David *v.* (C. A.) 146
Colliery (Blaenclydach) Company, Eaves *v.* (C. A.) 73
——— (Norton Hill) Company, Gane *v.* (C. A.) 539
——— (Ystradowen) Company *v.* Griffiths (C. A.) 533
County of Durham Electrical Power Distribution Company *v.* Inland Revenue Commissioners (C. A.) 604
Coventry, Jones & Co. *v.* 1029
Cowes Harbour Commissioners, Ulmann *v.* 1
Craske *v.* Wigan (C. A.) 635
Curtis *v.* Black & Co. (C. A.) 529

D.

David *v.* Britannic Merthyr Coal Company (C. A.) 146
Davies *v.* Harrison 104
Dean *v.* Brown (C. A.) 573
De Fries, Masson, Templier & Co. *v.* (C. A.) 831
Dendy *v.* Evans 894

PAGE

Derby Corporation, Pegg & Jones, Ld. *v.* 511
Devitt *v.* "Bainbridge" (Owners of S.S.) (C. A.) 802
Dewar & Webb, Rederiactieselskabet "Superior" *v.* (C. A.) 998
District Surveyors' Association, London County Council *v.* 138
Drummond, In re. Ex parte Ashmore 622
Duncan Fox & Co., Sailing Ship "Lyderhorn" Company *v.* (C. A.) 929
Dunning, Provincial Motor Cab Company *v.* 599
Durham (County of) Electrical Power Distribution Company *v.* Inland Revenue Commissioners (C. A.) 604

E.

E. Hulton & Co., Ld., Hawke *v.* 93
———, Jones *v.* (C. A.) 444
Eaves *v.* Blaenclydach Colliery Company (C. A.) 73
Edward Lloyd, Ld., Brice *v.* (C. A.) 804
Edwards, Child *v.* 753
Edwards & Co. *v.* Picard (C. A.) 908
Electrical Power Distribution (County of Durham) Company *v.* Inland Revenue Commissioners (C. A.) 604
Ellis & Collier, Ex parte. In re Hallman 430
Emery, Ex parte. Rex *v.* Stafford Prison (Governor) 81
Ettridge, Rex *v.* (C. C. A.) 24
Evans, Dendy *v.* 894

F.

Foukelmann, Jungheim, Hopkins & Co. *v.* 948

PAGE

Frankau & Co., Milch *v.* 100
Fulham Guardians, Rex *v.* 504
Fulton, Saxby *v.* (C. A.) 208

G.

Gadd *v.* Provincial Union Bank (C. A.) 353
Gane *v.* Norton Hill Colliery Company (C. A.) 539
Gas (Bristol) Company and Bristol Tramways and Carriage Company, In re 297
Geirionydd Rural Council *v.* Green (C. A.) 845
Gray, Matthews *v.* 89
Great Eastern Railway Company, Hertfordshire County Council *v.* (C. A.) 403
——, Lambert *v.* (C. A.) 776
——, Moss *v.* (C. A.) 274
Great Northern Railway Company, Sutton *v.* (C. A.) 791
Great Western Railway Company *v.* Barry Railway Company (C. A.) 670
Green, Geirionydd Rural Council *v.* (C. A.) 845
Greenhalgh, Pearl Life Assurance Company *v.* 288
Griffiths, Ystradowen Colliery Company *v.* (C. A.) 533
Grigg, Mason *v.* (C. A.) 341
Grimsdick *v.* Sweetman 740

H.

Hall, Mercantile Steamship Company *v.* 423
Hallman, In re. Ex parte Ellis & Collier 430
Hanrahan *v.* Leigh-on-Sea Urban Council (C. A.) 257
Harper & Co. *v.* Vigers Brothers 549
Harrison, Davies *v.* 104

PAGE

Hawke *v.* E. Hulton & Co., Ld. 93
Hertfordshire County Council *v.* Great Eastern Railway Company (C. A.) 403
Hillyer *v.* St. Bartholomew's Hospital (C. A.) 820
Howes *v.* Bishop (C. A.) 390
Hudson, Burton *v.* 564
Hughes *v.* Clover, Clayton & Co., Ld. (C. A.) 798
Hulton (E.) & Co., Ld., Hawke *v.* 93
——, Jones *v.* (C. A.) 444

I.

Inland Revenue Commissioners, County of Durham Electrical Power Distribution Company *v.* (C. A.) 604
Insurance (London and Manchester) Company, Porter *v.* 30
Internationale Guano en Superphosphaatwerken *v.* Robert Macandrew & Co. 360
Iron (Low Moor) Company, Provincial Bill Posting Company *v.* (C. A.) 344
Iron (Moss Bay) and Steel Company, McLean *v.* (C. A.) 521
Islington Corporation, Arlidge *v.* 127

J.

J. Lyons & Co., Ld. *v.* London Corporation 588
Jackson *v.* Watson & Sons (C. A.) 193
James, Newsum, Sons & Co., Ld. *v.* 384
Johnson, Pearl Life Assurance Company *v.* 288
—— *v.* Wilson 497
Jones *v.* Hulton (E.) & Co. (C. A.) 444
Jones & Co. *v.* Coventry 1029

PAGE

Jungheim, Hopkins & Co. *v.* Foukelmann 948

K.

Kepitigalla Rubber Estates, Ld. *v.* National Bank of India 1010
Kershaw *v.* Brooks 265

L.

Lambert *v.* Great Eastern Railway Company (C. A.) 776
Latimer, Tomlins *v.* In re Barton (C. A.) 841
Leigh-on-Sea Urban Council, Hanrahan *v.* (C. A.) 257
Life Assurance (Pearl) Company *v.* Greenhalgh 288
——— *v.* Johnson 288
Lion Brewery Company, Smith *v.* (C. A.) 912
Llangattock (Lord) *v.* Watney, Reid, Combe & Co., Ld. 884
London and Manchester Insurance Company, Porter *v.* 30
London Corporation, J. Lyons & Co., Ld. *v.* 588
London County Council *v.* District Surveyors' Association 138
——— *v.* Metropolitan Railway Company (C. A.) 317
London General Omnibus Company, Wing *v.* (C. A.) 652
Lords Commissioners of the Treasury, Rex *v.* 183
Low Moor Iron Company, Provincial Bill Posting Company *v.* (C. A.) 344
Lowery *v.* Walker 433
"Lyderhorn" (Sailing Ship) Company *v.* Duncan Fox & Co. (C. A.) 929
Lyons (J.) & Co., Ld. *v.* London Corporation 588

M.

PAGE

Macandrew (Robert) & Co., Internationale Guano en Superphosphaatwerken *v.* 360
Macbeth & Co., Chislett *v.* 36
——— (C. A.) 811
McDermott *v.* "Tintoretto" (Owners of S.S.) (C. A.) 704
McLean *v.* Moss Bay Iron and Steel Company (C. A.) 521
Manchester (London and) Insurance Company, Porter *v.* 30
Mangena *v.* Wright 958
Marks *v.* Carne (C. A.) 516
Marriott *v.* Yeoward Brothers 987
Marshall *v.* "Wild Rose" (Owners of S.S.) (C. A.) 46
Mason *v.* Grigg (C. A.) 341
Masson, Templier & Co. *v.* De Fries (C. A.) 831
Matthews *v.* Gray 89
Mercantile Steamship Company *v.* Hall 423
Merthyr (Britannic) Coal Company, David *v.* (C. A.) 146
Metropolitan Railway Company, London County Council *v.* (C. A.) 317
Michelmore, Pitts *v.* (C. A.) 244
Milch *v.* Frankau & Co. 100
Morgan, "Tynron" (Owners of Vessel) *v.* (C. A.) 66
Mortimer *v.* Secretan (C. A.) 77
Moss *v.* Great Eastern Railway Company (C. A.) 274
Moss Bay Iron and Steel Company, McLean *v.* (C. A.) 521
Motor Cab (Provincial) Company *v.* Dunning 599

N.

National Bank of India, Kepitigalla Rubber Estates, Ld. *v.* 1010

PAGE

Newsum, Sons & Co., Ld. *v.* James 384
Nokes *v.* Strong 625
Northumberland (Duke) and Tynemouth Corporation, In re 374
Norton Hill Colliery Company, Gane *v.* (C. A.) 539

O.

Omnibus (London General) Company, Wing *v.* (C. A.) 652

P.

Pearl Life Assurance Company *v.* Greenhalgh 288
——— *v.* Johnson 288
Pearson (S.) & Son, Ld., Tomalin *v.* (C. A.) 61
Pegg & Jones, Ld. *v.* Derby Corporation 511
Perry, Rex *v.* (C. C. A.) 697
Picard, Edwards & Co. *v.* (C. A.) 903
Pilling, In re 788
Pitts *v.* Michelmore (C. A.) 244
Plowden, Rex *v.* 269
Porter *v.* London and Manchester Insurance Company 30
Price, Read *v.* (C. A.) 724
Printers' (Calico) Association, Shirt *v.* (C. A.) 51
Provincial Bill Posting Company *v.* Low Moor Iron Company (C. A.) 344
Provincial Motor Cab Company *v.* Dunning 599
Provincial Union Bank, Gadd *v.* (C. A.) 353

R.

Rawson, Rex *v.* 748
Read *v.* Price (C. A.) 724
Rederiactieselskabet "Superior" *v.* Dewar & Webb (C. A.) 998

PAGE

Rex *v.* Board of Education 1045
— *v.* Chitson (C. C. A.) 945
— *v.* Ettridge (C. C. A.) 24
— *v.* Fulham Guardians 504
— *v.* Lords Commissioners of the Treasury 183
— *v.* Perry (C. C. A.) 697
— *v.* Plowden 269
— *v.* Rawson 748
— *v.* Richardson 851
— *v.* Smith (C. C. A.) 756
— *v.* Solomons (C. C. A.) 980
— *v.* Stafford Prison (Governor). Ex parte Emery 81
— *v.* Thompson 614
— *v.* Wilson (C. C. A.) 756
Richardson, Rex *v.* 851
Rubber (Kepitigalla) Estates, Ld. *v.* National Bank of India 1010

S.

S. Pearson & Son, Ld., Tomalin *v.* (C. A.) 61
Sailing Ship "Lyderhorn" Company *v.* Duncan Fox & Co. (C. A.) 929
St. Bartholomew's Hospital, Hillyer *v.* (C. A.) 820
Saxby *v.* Fulton (C. A.) 208
Secretan, Mortimer *v.* (C. A.) 77
Shirt *v.* Calico Printers' Association (C. A.) 51
Shrewsbury Town Clerk, Cartwright *v.* 169
Smith, Birkin *v.* (C. A.) 112
——— Bromley *v.* 235
——— Burr *v.* (C. A.) 306
——— *v.* Lion Brewery Company (C. A.) 912
——— Rex *v.* (C. C. A.) 756
——— *v.* Whiteman (C. A.) 437
Solomons, Rex *v.* (C. C. A.) 980
Spinning and Manufacturing (Walkden) Company, Booth *v.* 368
Stafford Prison (Governor), Rex *v.* Ex parte Emery 81

PAGE

Steamship (Mercantile) Company *v.* Hall 423
Steel and Tinplate (Upper Forest and Western) Company *v.* Thomas (C. A.) 631
Stowe *v.* Benstead 415
Strong, Nokes *v.* 625
"Superior" (Rederiactieselskabet) *v.* Dewar & Webb (C. A.) 998
Surrey County Council, Ching *v.* 762
Sutton *v.* Great Northern Railway Company (C. A.) 791
Sweetman, Grimsdick *v.* 740

T.

Thomas, Upper Forest and Western Steel and Tinplate Company *v.* (C. A.) 631
Thompson, Rex *v.* 614
"Tintoretto" (Owners of S.S.), McDermott *v.* (C. A.) 704
Tomalin *v.* S. Pearson & Son, Ld. (C. A.) 61
Tomlins *v.* Latimer. In re Barton (C. A.) 841
Tramways and Carriage (Bristol) Company and Bristol Gas Company, In re 297
Turner *v.* Walsh (C. A.) 484
Tynemouth Corporation and Duke of Northumberland, In re 374
"Tynron" (Owners of Vessel) *v.* Morgan (C. A.) 66

U.

Ulmann *v.* Cowes Harbour Commissioners 1

PAGE

Upper Forest and Western Steel and Tinplate Company *v.* Thomas (C. A.) 631

V.

Vigers Brothers, Harper & Co. *v.* 549

W.

Walkden Spinning and Manufacturing Company, Booth *v.* 368
Walker, Lowery *v.* 433
Walsh, Turner *v.* (C. A.) 484
Watney, Reid, Combe & Co., Ld. *v.* Llangattock (Lord) 884
Watson & Sons, Jackson *v.* (C. A.) 193
West Ham Corporation, Clarke *v.* (C. A.) 858
Whiteman, Smith *v.* (C. A.) 437
Wigan, Craske *v.* (C. A.) 635
"Wild Rose" (Owners of S.S.), Marshall *v.* (C. A.) 46
Wilson, Johnson *v.* 497
———, Rex *v.* (C. C. A.) 756
Wing *v.* London General Omnibus Company (C. A.) 652
Wright, Mangena *v.* 958

Y.

Yeoward Brothers, Marriott *v.* 987
Ystradowen Colliery Company *v.* Griffiths (C. A.) 533

Z.

"Zent" (Owners of S.S.), Bender *v.* (C. A.) 41

TABLE OF CASES CITED.

A.

		PAGE
Abbot of Coombe's Case	Lib. Ass. 43 Edw. 3, pl. 37	407
Abrath *v.* North Eastern Railway Company	11 App. Cas. 247	455
——— *v.* ———	11 Q. B. D. 79	779
———		
Acton *v.* Castle Mail Packets Company	73 L. T. 158	992
Adams, In re	14 Ch. D. 37	623
Adamson, Ex parte	8 Ch. D. 807	826
Akrokerri (Atlantic) Mines, Ld. *v.* Economic Bank	[1904] 2 K. B. 465	1035
Alcinbrook *v.* Hall	2 Wils. 309	217
Allbutt *v.* General Council of Medical Education and Registration	23 Q. B. D. 400	971
Allcard *v.* Skinner	36 Ch. D. 145	399
Anderson *v.* Jacobs	93 L. T. 17	568
——— *v.* Titmas	36 L. T. 711	575
Andrew *v.* Failsworth Industrial Society	[1904] 2 K. B. 32	636
Andrewes *v.* Elliott	6 E. & B. 338	953
Applegarth *v.* Colley	10 M. & W. 723	213
Armitage *v.* Lancashire and Yorkshire Railway Company	[1902] 2 K. B. 178	636
Armory *v.* Delamirie	1 Str. 504	418
Ashby's Cobham Brewery Company	[1906] 2 K. B. 754	378
Ashenden *v.* London, Brighton and South Coast Railway Company	5 Ex. D. 190	995
Aston *v.* Heaven	2 Esp. 533	872
Attorney-General *v.* Ashton Gas Company	[1904] 2 Ch. 621; [1906] A. C. 10	917
——— *v.* Barker	L. R. 7 Ex. 177	3
——— *v.* Hallett	15 M. & W. 97	3
——— *v.* Stewart	2 Mer. 143	63
——— *v.* West Riding of Yorkshire County Council	[1907] A. C. 29	767, 1056
Auckland (District of) Hospital *v.* Lovett	10 N. Z. L. R. 597	823

B.

Bailey *v.* Hobson	L. R. 5 Ch. 180	118
Baillie *v.* Inchiquin (Lord)	1 Esp. 435	728
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	742
Baines *v.* Geary	35 Ch. D. 154	238
Baker, In re	Unreported	787
——— *v.* Bolton	1 Camp. 493	193
Baldwin *v.* Elphinston	2 W. Bl. 1037	969

		PAGE
Bank of England *v.* Vagliano	[1891] A. C. 107	1017
Bank of Ireland *v.* Evans' Charities	5 H. L. C. 389	1019
Barjean *v.* Walmsley	2 Str. 1249	216
Barnes, Ex parte	[1896] A. C. 146	314
——— *v.* Ward	9 C. B. 392	434
Barron *v.* Willis	[1899] 2 Ch. 578	390
Bassett, In re	[1896] 1 Q. B. 219	623
Bell *v.* Black	22 L. R. Ir. 591	247
Bender *v.* Zent (Owners of S.S.)	[1909] 2 K. B. 41	46
Benett *v.* Peninsular and Oriental Steamboat Company	6 C. B. 775	871
Benoist, In re	[1909] 2 K. B. 784	789
Benson *v.* Lancashire and Yorkshire Railway Company	[1904] 1 K. B. 242	541
Bent's Brewery Company *v.* Dykes	25 Times L. R. 347	118
Berdoe *v.* Dawson	34 Beav. 603	394
Bessell *v.* Wilson	1 E. & B. 489	616
Bevan *v.* Crawshay Brothers, Ld.	85 L. T. 496 ; [1902] 1 K. B. 25	523
Biggar *v.* Rock Life Assurance Company	[1902] 1 K. B. 516	291
Binsted, In re	[1893] 1 Q. B. 199	431
Birch *v.* Birch	[1902] P. 130	574
Bird *v.* Holbrook	4 Bing. 628	434
Birkett *v.* Whitehaven Junction Railway Company	4 H. & N. 730	872
Bischoff's Trustee *v.* Frank	89 L. T. 188	394
Blair *v.* Buckworth	24 Times L. R. 474	355
Blake *v.* Midland Railway Company	[1904] 1 K. B. 503	643
Blanchard *v.* Cawthorne	4 Sim. 566	904
Blovelt *v.* Sawyer	[1904] 1 K. B. 271	805
Bluck, Ex parte	4 Morr. 273	784
Blum *v.* Ansley	16 Times L. R. 249	742
Bonnard *v.* Dott	[1906] 1 Ch. 740	354
Bottomley *v.* Brougham	[1908] 1 K. B. 584	308
Bourke *v.* Warren	2 Car. & P. 307	448
Bracegirdle *v.* Bailey	1 F. & F. 536	970
Bradshaw *v.* Lancashire and Yorkshire Railway Company	L. R. 10 C. P. 189	203
——— *v.* Widdrington	[1902] 2 Ch. 430	729
Brass *v.* Maitland	6 E. & B. 470	362
Bretherton *v.* Wood	3 Brod. & B. 54	872
Brickwood & Co. *v.* Reynolds	[1898] 1 Q. B. 95	914
Bruntons, Ld. *v.* Turvey	[1905] A. C. 230	534
British Electric Traction Company *v.* Inland Revenue Commissioners	[1902] 1 K. B. 441	606
British Mutoscope and Biograph Company *v.* Homer	18 Rep. Pat. Cas. 177	904
Broadbent *v.* Shepherd	[1901] 2 K. B. 274	130
Broadhead *v.* Marshall	2 W. Bl. 955	575
Brock *v.* Copeland	1 Esp. 203	435
Bromage *v.* Prosser	4 B. & C. 247	448
Brown *v.* Brown	8 E. & B. 876	737
——— *v.* Johnson	10 M. & W. 331	102
Bryon *v.* Metropolitan Saloon Omnibus Company	4 Drew. 546	624
Buckley *v.* Cross	32 L. J. (Q.B.) 129	419
Burke *v.* South Eastern Railway Company	5 C. P. D. 1	870

C.

		PAGE
Caledonian Railway Company *v.* Carmichael	L. R. 2 H. L. Sc. 56	379
——— *v.* Greenock and Wemyss Bay Railway Company	L. R. 2 H. L. Sc. 347	675
Callow *v.* Tillstone	83 L. T. 411	602
Calvert, In re	6 Man. 209	785
Campbell *v.* Spottiswoode	3 B. & S. 769	966
Cannan *v.* Bryce	3 B. & Al. 179	218
Capital and Counties Bank *v.* Gordon	[1903] A. C. 240	1034
——— *v.* Henly	7 App. Cas. 741	450, 970
Carden, Ex parte	52 Sol. J. 209	354
Carpue *v.* London, Brighton and South Coast Railway Company	5 Q. B. 747	653
Carr *v.* Jackson	7 Ex 382	555
——— *v.* Lancashire and Yorkshire Railway Company	7 Ex. 707	866
Carron Iron Company *v.* Maclaren	5 H. L. C. 416	370
Casborne *v.* Scarfe	1 Atk. 603	495
Castle Spinning Company *v.* Atkinson	[1905] 1 K. B. 336	78
Caton *v.* Rideout	1 Mac. & G. 599	402
Challis *v.* London and South Western Railway Company	[1905] 2 K. B. 154	637, 810
Chamberlain *v.* Williamson	2 M. & S. 408	203
Chandler *v.* Smith	[1899] 2 Q. B. 506	707
Chaplin & Co. *v.* Brammall	[1908] 1 K. B. 233	393
Chappel *v.* Comfort	10 C. B. (N.S.) 802	1003
Chatfield *v.* Cox	18 Q. B. 321	606
Chatterton *v.* London and County Bank	The *Miller*, Nov. 3, 1890; Paget on Banking, 2nd ed. p. 156	1018
Cholmondeley *v.* Clinton	2 Jac. & W. 1	496
Christie *v.* Griggs	2 Camp. 79	662, 823, 872
Christofferson *v.* Hansen	L. R. 7 Q. B. 509	1002
Clark, In re	[1898] 1 Q. B. 20	431
——— *v.* London General Omnibus Company	[1906] 2 K. B. 648; 95 L. T. 435	194, 199
Clarke *v.* Crowder	L. R. 4 C. P. 638	418
Cobbett *v.* Brock	20 Beav. 524	393
Cockrill *v.* Sparkes	1 H. & C. 699	728
Coe *v.* Wise	5 B. & S. 440	769
Coggs *v.* Bernard	2 Ld. Raym. 909; 1 Sm. L. C., 11th ed. p. 173	877
Colchester Corporation *v.* Brooke	7 Q. B. 339	4
Colonial Bank of Australasia *v.* Marshall	[1906] A. C. 559	1019
Cooke *v.* Lamotte	15 Beav. 234	393
——— *v.* Midland Great Western Railway of Ireland	[1909] A. C. 229	437
Coope *v.* Cresswell	L. R. 2 Ch. 112	729
Cooper *v.* Norfolk Railway Company	3 Ex. 546	381
Copestake *v.* Hoper	[1908] 2 Ch. 10	492
Corbett *v.* Pearce	[1904] 2 K. B. 422	36, 811
Cormack *v.* Wick School Board	16 R. 812	769
Corn *v.* Matthews	[1893] 1 Q. B. 310	239
Cornford *v.* Carlton Bank	[1900] 1 Q. B. 22	96
Cornwall *v.* Hawkins	41 L. J. (Ch.) 435	238
Cowper *v.* Cowper	L. R. 2 Ch. 127	587
Craske *v.* Wigan	[1909] 2 K. B. 635	806

		PAGE
Cremins *v.* Guest, Keen & Nettlefolds	[1908] 1 K. B. 469	541
Criglington *v.* Anderson	26 L. R. Ir. 131	247
Crocker *v.* Plymouth Corporation	[1906] 1 K. B. 494	1055
Cross, Tetley & Co. *v.* Catterall	Not reported	540
Crossley Brothers *v.* Lee	[1908] 1 K. B. 86	346
Crouch *v.* Credit Foncier of England	L. R. 8 Q. B. 374	1036
Crowe *v.* Price	22 Q. B. D. 429	1033
Cull *v.* Austin	L. R. 7 C. P. 227	247
Curry *v.* Edensor	3 T. R. 524	606

D.

Darby *v.* Harris	1 Q. B. 895	345
Darlington *v.* Roscoe & Sons	[1907] 1 K. B. 219	62
David *v.* Britannic Merthyr Coal Company	[1909] 2 K. B. 146	866
Davidson *v.* Hill	[1901] 2 K. B. 606	63
Davies *v.* Rees	17 Q. B. D. 408	441
——— *v.* Rhymney Iron Company	16 Times L. R. 329	541
Davis *v.* Garrett	6 Bing. 716	362
——— *v.* Shepstone	11 App. Cas. 187	966
——— *v.* Wallis	[1908] 2 K. B. 134	628
Dawkins *v.* Rokeby (Lord)	L. R. 7 H. L. 744	309
Dawson *v.* Braime's Tadcaster Breweries, Ld.	[1907] 2 Ch. 359	120
Deane *v.* Clayton	7 Taunt. 489	435
Debtor, In re a	[1905] 1 K. B. 374	431
———	[1907] 2 K. B. 896	624
De Crespigny *v.* Wellesley	5 Bing. 392	483
Denaby Main Colliery Company *v.* Manchester, Sheffield and Lincolnshire Railway Company	11 App. Cas. 97	870
Derry *v.* Peek	14 App. Cas. 337	465
Devine's Case	Lawson's Reg. Cas. 1885 to 1893, p. 128	247
Dibble *v.* Bowater	2 E. & B. 564	754
Dickson *v.* Great Northern Railway Company	18 Q. B. D. 176	866
Dillon *v.* Haverfordwest Corporation	[1891] 1 Q. B. 575	926
Dixon *v.* Wells	25 Q. B. D. 249	750
Doe *v.* Edwards	5 B. & Ad. 1065	492
Dovaston *v.* De la Bertauche	17 Times L. R. 547	575
Drugan *v.* Buchanan	Lawson's Reg. Cas. 1885 to 1893, p. 128	247
Du Bost *v.* Beresford	2 Camp. 511	449
Du Cros *v.* Lambourne	[1907] 1 K. B. 40	602
Duero, The	2 A. & E. 393	870
Duncan *v.* Findlater	6 Cl. & F. 894	202
Dunham *v.* Clare	[1902] 2 K. B. 292	534

E.

Earnshaw *v.* Earnshaw	[1896] P. 160	854
Eastern Counties Railway Company *v.* Broom	6 Ex. 314	779
Eastman Photographic Materials Company *v.* Comptroller-General of Patents, Designs, and Trade Marks	[1898] A. C. 571	709

		PAGE
Eaton *v.* Johns	1 Dowl. (N.S.) 602	966
Eberle's Hotels Company *v.* Jonas	18 Q. B. D. 459	347
Ecclesiastical Commissioners *v.* London and South Western Railway Company	14 C. B. 743	381
Eder *v.* Levy	19 Q. B. D. 210	101
Edwards *v.* Marcus	[1894] 1 Q. B. 587	440
——— *v.* Midland Railway Company	6 Q. B. D. 287; 50 L. J. (Q.B.) 281	779
Elliott *v.* Liggens	[1902] 2 K. B. 84	707
Ellissen, Ex parte	Not reported. Referred to in Starkie on Libel and Slander, 4th ed. p. 592	19
Emmens *v.* Pottle	16 Q. B. D. 354	448
Etherington and Lancashire and Yorkshire Accident Insurance Company, In re	[1909] 1 K. B. 591	534
Europa, The	[1908] P. 84	362
Evans *v.* Liverpool Corporation	[1906] 1 K. B. 160	823
——— *v.* Ware	[1892] 3 Ch. 502	238

F.

Fairclough *v.* Marshall	4 Ex. D. 37	486
Fairlie *v.* Fenton	L. R. 5 Ex. 169	554
Fawkes *v.* Lamb	31 L. J. (Q.B.) 98	554
Fellows *v.* Wood	59 L. T. 513	238
Fenton *v.* Thorley & Co	[1903] A. C. 443	636, 799
Field *v.* Longden & Sons	[1902] 1 K. B. 47	642
Fisher *v.* Val de Travers Asphalte Company	1 C. P. D. 259.	26
Fitzgerald *v.* W. G. Clarke & Son	[1908] 2 K. B. 796	636
Fletcher *v.* Rylands	L. R. 1 Ex. 265	436
Flower *v.* London and North Western Railway Company	[1894] 2 Q. B. 65	870
Foreman *v.* Canterbury Corporation	L. R. 6 Q. B. 214	823
Forsdike *v.* Colquhoun	11 Q. B. D. 71	106
Fosberry *v.* Waterford and Limerick Railway Company	13 Ir. C. L. R. 494	407
Foster *v.* Great Western Railway Company	[1904] 2 K. B. 306	363
Fowler *v.* Padget	7 T. R. 509	26
Francesco *v.* Massey	L. R. 8 Ex. 101	1007
Francis Morton & Co., Ld. *v.* Woodward	[1902] 2 K. B. 276	633, 642
Frederick *v.* Bognor Water Company	78 L. J. (Ch.) 40	592
Frost *v.* Aylesbury Dairy Company	[1905] 1 K. B. 608	196
Fry *v.* Chartered Mercantile Bank of India	L. R. 1 C. P. 689	1003

G.

Gallagher *v.* Chambers	Lawson's Reg. Cas. 1885 to 1893, p. 138	247
Gallin *v.* London and North Western Railway Company	L. R. 10 Q. B. 212	866
Gamble, In re	[1899] 1 Q. B. 305	853

		PAGE
Gane *v.* Norton Hill Colliery Company	[1909] 2 K. B. 539	806
Gardner *v.* Trechmann	15 Q. B. D. 154	998
Garton *v.* Bristol and Exeter Railway Company	1 B. & S. 112	878
Gay *v.* Cadby	2 C. P. D. 391	592
Gibbons *v.* Chambers	Cab. & E. 577	742
——— *v.* Vanguard Motorbus Company	25 Times L. R. 14	655
Gibson *v.* Young	21 N. S. W. L. R. 7	769
Gilbertson *v.* Fergusson	7 Q. B. D. 562	917
Glavin *v.* Rhode Island Hospital	34 Amer. Rep. 675	823
Goff *v.* Great Northern Railway Company	3 E. & E. 672	780
Golder *v.* Caledonian Railway Company	40 Sc. L. R. 89	535
Gore *v.* Bowser	3 Sm. & G. 1	904
Gowan *v.* Christie	L. R. 2 H. L. Sc. 273	744
Graham *v.* Londonderry (Lord)	3 Atk. 393	833
Grant *v.* Glasgow and South Western Railway Company	45 Sc. L. R. 128	42
Gray *v.* Carr	L. R. 6 Q. B. 522	1001
Great Eastern Steamship Company, In re	5 Asp. M. C. 511	38, 814
Great Western Railway Company *v.* Halesowen Railway Company	52 L. J. (Q.B.) 473	674
——— *v.* McCarthy	12 App. Cas. 218	865
——— *v.* Sutton	L. R. 4 H. L. 237	882
——— *v.* Waterford and Limerick Railway Company	17 Ch. D. 493	679
Green *v.* Thompson	[1899] 2 Q. B. 1	239
Gregson *v.* Potter	4 Ex. D. 142	865
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	916
Greta Holme, The	[1897] A. C. 596	203
Grigby *v.* Cox	1 Ves. Sen. 517	396
Groves *v.* Wimborne (Lord)	[1898] 2 Q. B. 402	149, 865
Groves, Maclean & Co. *v.* Volkart Bros.	1 Cab. & E. 309	935
Guerin, In re	58 L. J. (M.C.) 42; 60 L. T. 538	16, 22

H.

Hadley *v.* Baxendale	9 Ex. 341	204
Halifax Union *v.* Wheelwright	L. R. 10 Ex. 183	1017
Hall *v.* Knox	4 B. & S. 515	26
—— *v.* Lees	[1904] 2 K. B. 602	823
—— *v.* North Eastern Railway Company	L. R. 10 Q. B. 437	866
Hancock & Co. *v.* Gillard	[1907] 1 K. B. 47	914
Hansen *v.* Harrold	[1894] 1 Q. B. 612	1003
Harrison *v.* North Eastern Railway Company	29 L. T. 844	433
——— *v.* Smith	20 L. T. 713	448
Hart *v.* Arrol	6 F. 36	742

		PAGE
Hastings *v.* Douglas	Cro. Car. 343	837
Haworth *v.* Andrew Knowles & Sons	19 Times L. R. 658	280
Haydon *v.* Williams	7 Bing. 163	738
Heath *v.* Pugh	6 Q. B. D. 345	494
Heaven *v.* Pender	11 Q. B. D. 503	195
Hellawell *v.* Eastwood	6 Ex. 295	347
Henderson *v.* Eason	17 Q. B. 701	121
——— *v.* Stevenson	L. R. 2 H. L. Sc. 416	866
Hennessy *v.* Wright	24 Q. B D. 445, n.	970
Heseltine *v.* Simmons	[1892] 2 Q. B. 547	443
Hewitson *v.* Sherwin	L. R. 10 Eq. 53	431
Higgins *v.* Butcher	Yelv. 89	195
Hill *v.* East and West India Dock Company	9 App. Cas. 448	261
Hobson *v.* Gorringe	[1897] 1 Ch. 182	346
Hodgson *v.* Temple	5 Taunt. 181	218
Hoghton *v.* Hoghton	15 Beav. 278	393
Holland *v.* Hodgson	L. R. 7 C. P. 328	346
Holliday *v.* St. Leonard, Shoreditch	11 C. B. (N.S.) 192	830
Holmes *v.* Great Northern Railway Company	[1900] 2 Q. B. 409	541
——— *v.* Millage	[1893] 1 Q. B. 551	903
Holness *v.* Mackay & Davis	[1899] 2 Q. B. 319	541
Hope *v.* Hope	8 D. M. & G. 731	217
Houghton *v.* Plimsoll	*The Times*, April 2, 1874	969
How *v.* London and North Western Railway Company	[1892] 1 Q. B. 391	574
Howard *v.* Fanshawe	[1895] 2 Ch. 581	899
Howells *v.* Landore Siemens Steel Company	L. R. 10 Q. B. 62	150
Hughes *v.* Griffiths	13 C. B. (N.S.) 324	103
Huguenin *v.* Baseley	14 Ves. 273	390
Humble *v.* Hunter	12 Q. B. 310	554
Hunt *v.* Great Northern Railway Company	[1891] 2 Q. B. 189	970
——— *v.* Star Newspaper Company	[1908] 2 K. B. 309	966
Hyams *v.* Stuart King	[1908] 2 K. B. 696	219
Hyman *v.* Nye	6 Q. B. D. 685	655

I.

Indermaur *v.* Dames	L. R. 1 C. P. 274; L. R. 2 C. P. 311	864
Ireland *v.* Livingston	L. R. 5 H. L. 395	1022
Isaac Walton & Co. *v.* Vanguard Motorbus Company	25 Times L. R. 13	655
Isitt *v.* Railway Passengers' Assurance Company	22 Q. B. D. 504	534
Ismay, Imrie & Co. *v.* Williamson	[1908] A. C. 437	636, 799

J.

Jacobs *v.* Seward	L. R. 5 H. L. 464	121
Jane and Matilda, The	1 Hagg. Adm. 187	38, 814
Johnson *v.* Aylmer	Cro. Jac. 126	460
——— *v.* Midland Railway Company	4 Ex. 367	877

		PAGE
Jones *v.* Carter	15 M. & W. 718	897
—— *v.* Inland Revenue Commissioners	[1895] 1 Q. B. 484	606
Jordin *v.* Crump	8 M. & W. 782	436
Joseph Thorley, Ld. *v.* Orchis Steamship Company	[1907] 1 K. B. 660	360
Josolyne *v.* Meeson	53 L. T. 319	143
Joynt *v.* Cycle Trade Publishing Company	[1904] 2 K. B. 292	966

K.

Kaufman *v.* Gerson	[1904] 1 K. B. 591	216
Keighley, Maxsted & Co. *v.* Durant	[1901] A. C. 240	450
Kellard *v.* Rooke	21 Q. B. D. 367	38
Kennedy *v.* De Trafford	[1897] A. C. 180	120
King *v.* Kemp	8 L. T. (N.S.) 255	219
—— *v.* Massey	24 Times L. R. 710	355
—— *v.* Turnbull	24 Times L. R. 434	355
Kirchner *v.* Venus	12 Moo. P.C. 361	1001
Kirkby *v.* North British and Mercantile Insurance Company	[1896] 2 Q. B. 99	101
Kirkwood *v.* Ostwind	Matthews and Spear on the Money-lenders Act, 1900, p. 111	355
Kish *v.* Cory	L. R. 10 Q. B. 553	1001
Knights *v.* Quarles	2 Brod. & B. 102	203
Kotchie *v.* Golden Sovereigns, Ld.	[1898] 2 Q. B. 164	386
Krell *v.* Henry	[1903] 2 K. B. 740	742
Kruse *v.* Johnson	[1898] 2 Q. B. 91	131

L.

Lacey, In re	[1907] 1 Ch. 330	732
Lancashire, The	L. R. 4 A. & E. 198	655
Lancashire and Yorkshire Railway Company *v.* Bury Corporation	14 App. Cas. 417	407
Lane *v.* Cotton	12 Mod. 472	877
Langridge *v.* Levy	2 M. & W. 519; 4 M. & W. 337	195
Latimer *v.* Western Morning News	25 L. T. 44	449
Law Guarantee and Trust Society *v.* Mitcham and Cheam Brewery Company	[1906] 2 Ch. 98	118
Lawder *v.* Lawder	5 Ir. C. L. R. 27	21
Lazarus *v.* Gardner	25 Times L. R. 499	355
Leather Manufacturers' Bank *v.* Morgan	117 U. S. Rep. 96	1018
Leconfield (Lord) *v.* London and North Western Railway Company	[1907] 1 Ch. 38	379
Leech *v.* North Staffordshire Railway Company	29 L. J. (M.C.) 150	407
Le Fanu *v.* Malcomson	1 H. L. C. 637	448
Leigh *v.* Taylor	[1902] A. C. 157	347
Leslie *v.* Fitzpatrick	3 Q. B. D. 229	239
Lewes Sanitary Steam Laundry Company *v.* Barclay, Bevan & Co.	11 Com. Cas. 255	1017

		PAGE
Lewis *v.* Baker	[1905] 1 Ch. 46	891
—— *v.* Great Western Railway Company	3 Q. B. D. 195	865
—— *v.* Levy	E. B. & E. 537	970
Lilley *v.* Doubleday	7 Q. B. D. 510	362
Limmer Asphalte Paving Company *v.* Inland Revenue Commissioners	L. R. 7 Ex. 211	606
Linfoot *v.* Pockett	[1895] 2 Ch. 835	440
Liverpool Corporation *v.* Peter Walker & Son	[1908] 2 K. B. 33	743
Lloyd *v.* Lloyd	14 Q. B. D. 725	28
Lockhart *v.* Falk	L. R. 10 Ex. 132	1009
London and North Western Railway Company *v.* Skerton	5 B. & S. 559	407
London and Provincial Laundry Company *v.* Willesden Local Board	[1892] 2 Q. B. 271	592
London County Council *v.* Attorney-General	[1901] A. C. 26	917
———— *v.* Brass	17 Times L. R. 504	131
———— *v.* Lewis	69 L. J. (Q.B.) 277	131
———— *v.* Read	81 L. T. 452.	611
Lowfield *v.* Bancroft	Str. 934	459
Lowry *v.* Sheffield Coal Company	24 Times L. R. 142	541
Lowther *v.* Caledonian Railway Company	[1891] 3 Ch. 443; [1892] 1 Ch. 73	380
Lucas *v.* Harris	18 Q. B. D. 127	1033
Lumsden *v.* Barton	19 Times L. R. 53	743
Lynch *v.* Nurdin	1 Q. B. 29	434

M.

M'Cartney *v.* Black	22 L. R. Ir. 591	247
McCawley *v.* Furness Railway Company	L. R. 8 Q. B. 57	866
McDonald *v.* Banana (Owners of S.S.)	[1908] 2 K. B. 926	42, 47
———— *v.* Massachusetts General Hospital	21 Amer. Rep. 529	823
Macdougall *v.* Knight	25 Q. B. D. 1	967
M'Gaffigan *v.* Riddall	28 L. R. Ir. 257	247
McKinnell *v.* Robinson	3 M. & W. 434	212
McLaren, Ex parte	16 Ch. D. 534	371
MacMahon *v.* Field	7 Q. B. D. 591.	204
McManus *v.* Lancashire and Yorkshire Railway Company	4 H. & N. 327	873
McNicholas *v.* Dawson & Son.	[1899] 1 Q. B. 773	43
Main Colliery Company *v.* Davies	[1900] A. C. 358	523
Major *v.* Shrewsbury Town Clerk	[1909] 1 K. B. 348	174
Makin *v.* Attorney-General for New South Wales	[1894] A. C. 57	947
Mallan *v.* May	11 M. & W. 653	238
Mallet *v.* Great Eastern Railway Company	[1899] 1 Q. B. 309	363
Manchester, Sheffield and Lincolnshire Railway Company *v.* Brown	8 App. Cas. 703	865
Manchester Trust *v.* Furness	[1895] 2 Q. B. 539	1001
Mangena *v.* Edward Lloyd, Ld.	98 L. T. 640; 25 Times L. R. 26	958, 969

		PAGE
Martin *v.* Great Indian Peninsular Railway Company	L. R. 3 Ex. 9	196
Matthews *v.* Usher	[1900] 2 Q. B. 535	486
Meakin *v.* Morris	12 Q. B. D. 352	239
Mersey Docks Trustees *v.* Gibbs	L. R. 1 H. L. 93	769, 830, 864
Meux *v.* Great Eastern Railway Company	[1895] 2 Q. B. 387	196
Milch *v.* Frankau & Co.	[1909] 2 K. B. 100	756
Miller *v.* Race	1 Sm. L. C., 2nd ed. p. 259; 11th ed. p. 473	1036
Miller & Co. *v.* Solomon	[1906] 2 K. B. 91	386
Missouri Steamship Company, In re	42 Ch. D. 321	217
Mitchel *v.* Reynolds	1 P. Wms. 181	239
Mitchell *v.* Glamorgan Coal Company	23 Times L. R. 588	43
Moger *v.* Escott	L. R. 7 C. P. 158	246
Molyneux *v.* Richard	[1906] 1 Ch. 34	486
Monoghan *v.* Horn	7 Canada Sup. Ct. R. 409	195
Moody *v.* Rowell	17 Pick. (Amer.) 490	21
Moore *v.* Manchester Liners, Ld.	[1909] 1 K. B. 417	42
—— *v.* Metropolitan Railway Company	L. R. 8 Q. B. 36	779
Morgan *v.* Ravey	6 H. & N. 265	204
Morris *v.* Barrett	29 L. J. (C.P.) 102	102
—— *v.* Lambeth Corporation	22 Times L. R. 22	806
Morritt *v.* North Eastern Railway Company	1 Q. B. D. 302	363
Moses *v.* Marsland	[1901] 1 K. B. 668	143
Moulis *v.* Owen	[1907] 1 K. B. 746	208
Mountain *v.* Parr	[1899] 1 Q. B. 805	792
Muirhead, In re	2 Ch. D. 22	431
Mumford *v.* Hitchcocks	14 C. B. (N.S.) 361	102
Municipal Permanent Investment Building Society *v.* Smith	22 Q. B. D. 70	490
Munster *v.* Lamb	11 Q. B. D. 588	310
Murley *v.* Grove	46 J. P. 360	436
Murtagh *v.* Barry	24 Q. B. D. 632	573

N.

National Telephone Company *v.* Inland Revenue Commissioners	[1899] 1 Q. B. 250; [1900] A. C. 1	606
Nedby *v.* Nedby	5 De G. & Sm. 377	396
Newby *v.* Sharpe	8 Ch. D. 39	742
Nicholson *v.* Piper	[1907] A. C. 215	67
Noakes *v.* Noakes & Co.	[1907] 1 Ch. 64	118
Norris *v.* Bailey	62 L. J. (Q.B.) 338	342
North Staffordshire Railway Company *v.* Dale	8 E. & B. 836	407
Nott-Bower *v.* Liverpool Corporation	68 J. P. 243	188
Nuth *v.* Tamplin	8 Q. B. D. 247	177

O.

Oakes *v.* Monkland Iron Company	11 R. 579	813
Odger *v.* Mortimer	28 L. T. 472	966
Ohlsen *v.* Terrero	L. R. 10 Ch. 127	21
Oliver *v.* North Eastern Railway Company	L. R. 9 Q. B. 409	407

		PAGE
Olley's Case	Lawson's Reg. Cas. 1885 to 1893, p. 214	247
Osborn *v.* Gillett	L. R. 8 Ex. 88	194
——— *v.* Vickers, Sons & Maxim	[1900] 2 Q. B. 91	803
Owens *v.* Hanrahan	26 L. R. Ir. 418	247

P.

Palmer *v.* Wade	[1894] 1 Q. B. 268	246
Paradine *v.* Jane	Al. 26	742
Parfitt *v.* Lawless	L. R. 2 P. & M. 462	393
Parker *v.* Inge	17 Q. B. D. 584	131
——— *v.* South Eastern Railway Company	2 C. P. D. 416	866, 989
Parnaby *v.* Lancaster Canal Company	11 Ad. & E. 223	864
Payne *v.* Partridge	1 Show. 255	875
Peacock *v.* Reg.	4 C. B. (N.S.) 264	101
Pearce *v.* Brooks	L. R. 1 Ex. 213	218
Pearks *v.* Ward	[1902] 2 K. B. 1	96
Pederson *v.* Lotinga	28 L. T. (O.S.) 267; 5 W. R. 290	998, 1006
Peebles *v.* Oswaldtwistle Urban Council	[1896] 2 Q. B. 159	63
Peek *v.* North Staffordshire Railway Company	10 H. L. C. 473	995
Pellecat *v.* Angell	2 C. M. & R. 311	218
Pettit *v.* Lodge	[1908] 1 K. B. 744	440
Phillips *v.* Evans	[1896] 1 Q. B. 305	502
——— *v.* Homfray	24 Ch. D. 439	203
Pickard *v.* Baylis	5 C. P. D. 235	177
Pole *v.* Bright	[1892] 1 Q. B. 603	575
Ponsford *v.* Financial Times, Ld.	16 Times L. R. 248	970
Ponting *v.* Noakes	[1894] 2 Q. B. 281	434
Porteus *v.* Watney	3 Q. B. D. 534	1002
Powell *v.* Main Colliery Company	[1900] 2 Q. B. 145; [1900] A. C. 366	793
——— *v.* Powell	[1900] 1 Ch. 243	400
Preston Banking Company *v.* William Allsup & Son	[1895] 1 Ch. 141	789
Price *v.* Green	16 M. & W. 346	238
Pringle *v.* Gloag	10 Ch. D. 676	624
Printing Telegraph and Construction Company of the Agence Havas *v.* Drucker	[1894] 2 Q. B. 801	970
Pyke, Ex parte	8 Ch. D. 754	214

Q.

Quarrier *v.* Colston	1 Ph. 147	208

R.

Raglan Highway Board *v.* Monmouth Steam Company	46 J. P. 598	848
Raine *v.* Jobson & Co.	[1901] A. C. 404	38, 814
Rainer & Co. *v.* Holmes	Unreported	911
Randall *v.* Newson	2 Q. B. D. 102	195
Raymond *v.* Fitch	2 C. M. & R. 588	203

		PAGE
Readhead *v.* Midland Railway Company	L. R. 2 Q. B. 412; L. R. 4 Q. B. 379	654, 877
Reed *v.* Great Western Railway Company	[1909] A. C. 31	806
Reg. *v.* Adamson	1 Q. B. D. 201	1056
—— *v.* Barnard	43 J. P. 127	449
—— *v.* Berry	1 Q. B. D. 447	82
—— *v.* Bertrand	L. R. 1 P. C. 520	16
—— *v.* Buttle	1 C. C. R. 248	26
—— *v.* Carden	5 Q. B. D. 1	18
—— *v.* City of London Court	25 Q. B. D. 339	38
—— *v.* Coney	51 L. J. (M.C.) 66	602
—— *v.* East Ardsley (Inhabitants)	14 Q. B. 793	26
—— *v.* Ely (Inhabitants)	15 Q. B. 827	407
—— *v.* Forester	10 Cox, C. C. 368	700
—— *v.* Gloster	16 Cox, C. C. 471	700
—— *v.* Hughes	4 Q. B. D. 614	750
—— *v.* Jeffreys	22 L. T. 786	17
—— *v.* Jenkins	L. R. 1 C. C. 187	700
—— *v.* Judge of City of London Court.	25 Q. B. D. 339	813
—— *v.* Kerswill	[1895] 1 Q. B. 1	854
—— *v.* Lords Commissioners of the Treasury	L. R. 7 Q. B. 387	187
—— *v.* Master	L. R. 4 Q. B. 285	854
—— *v.* Middlesex Justices	17 L. J. (M.C.) 111	100
—— *v.* ————	12 L. J. (M.C.) 59	102
—— *v.* Midland Railway Company	19 Q. B. D. 540	674
—— *v.* Osman	15 Cox, C. C. 1	697
—— *v.* Paget	8 Q. B. D. 151	854
—— *v.* Peel	2 F. & F. 21	700
—— *v.* Poor Law Commissioners	12 Ir. C. L. R. 212	1057
—— *v.* St. Marylebone Vestry	20 Q. B. D. 415	890
—— *v.* Smith	L. R. 1 C. C. R. 266	271
—— *v.* Stimpson	4 B. & S. 301	570
—— *v.* Streeter	[1900] 2 Q. B. 601	271
—— *v.* Surrey Justices	[1892] 2 Q. B. 719	759
—— *v.* Taylor	L. R. 2 C. C. R. 147	602
—— *v.* Witmarsh	62 J. P. 680	700
—— *v.* Wood	L. R. 4 Q. B. 559	612
Reid's Brewery Company *v.* Male	[1891] 2 Q. B. 1	915
Reis *v.* Perry	64 L. J. (Q.B.) 566	969
Rex *v.* Abbott	67 J. P. 151	700
—— *v.* Abinger (Lord)	1 Esp. 226	448
—— *v.* Alderton	Pasch. 29 Geo. 2, B. R.	460
—— *v.* Bond	[1906] 2 K. B. 389	947
—— *v.* Cable	[1906] 1 K. B. 719	750
—— *v.* Creevey	1 M. & S. 273	969
—— *v.* Davidson	[1909] W. N. 52	24
—— *v.* Dyson	7 C. & P. 305, n	82
—— *v.* Everdon (Inhabitants)	9 East, 101	26
—— *v.* Hamilton	1 Cr. App. R. 87	759
—— *v.* Hawks	Str. 858	759
—— *v.* Horne	Cowp. 672	460
—— *v.* Income Tax Commissioners	91 L. T. 94	1055
—— *v.* Kent (Inhabitants)	13 East, 220	407
—— *v.* Kerrison	3 M. & S. 526	407
—— *v.* Lindsey (Inhabitants)	14 East, 314	407
—— *v.* Marsden	4 M. & S. 164	462
—— *v.* Marsham	[1907] 2 K. B. 638	272

		PAGE
Rex *v.* Nuttall	1 Cr. App. Rep. 180	25
—— *v.* Pritchard	7 C. & P. 303	82
—— *v.* Smith	2 Stark. 208	22
—— *v.* Steel	1 Leach, 451	83
—— *v.* Vasey	[1905] 2 K. B. 748	26
—— *v.* Vipont	2 Burr. 1163	759
—— *v.* Wilkins	[1907] 2 K. B. 380	750
—— *v.* Woodcock	1 Leach, C.C. 500	700
Reynolds *v.* Ashby	[1903] 1 K. B. 87; [1904] A. C. 466	346
Rhys *v.* Dare Valley Railway Company	L. R. 19 Eq. 93	379
Richardson, Spence & Co. *v.* Rowntree	[1894] A. C. 217	870, 989
Riddell *v.* M'Aleer	28 L. R. Ir. 257	247
River Wear Commissioners *v.* Adamson	2 App. Cas. 743	479
Robbins *v.* Whyte	[1906] 1 K. B. 125	491
Robinson *v.* Bland	1 W. Bl. 234; 2 Burr. 1077	212
Roddam *v.* Morley	1 De G. & J. 1	724
Rodgers *v.* Richards	[1892] 1 Q. B. 555	751
Rogers *v.* Lewis	7 C. B. (N.S.) 29	246
Rothwell *v.* Davies	19 Times L. R. 423	57
Rousillon *v.* Rousillon	14 Ch. D. 351	216
Routledge *v.* Ramsay	8 Ad. & E. 221	728
Rowberry *v.* Morgan	9 Ex. 730	101
Rowbotham *v.* Wilson	8 E. & B. 123; 8 H. L. C. 348	867
Rowland *v.* Wright	[1909] 1 K. B. 963	636
Royal Aquarium and Summer and Winter Garden Society *v.* Parkinson	[1892] 1 Q. B. 431	309
Ruby, The	[1898] P. 59	38, 814
Rumsey *v.* North Eastern Railway Company	11 C. B. (N.S.) 641	872
Russell *v.* Town and County Bank	13 App. Cas. 418	916
Rylands *v.* Fletcher	L. R. 3 H. L. 330	665

S.

Saffery *v.* Mayer	[1901] 1 K. B. 11	219
St. Margaret's Vestry *v.* Queen Anne Mansions Company	57 J. P. 277	592
St. Martin's Vestry *v.* Gordon	[1891] 1 Q. B. 61	591
Salisbury (Marquis) and London and North Western Railway Company, In re	[1892] 1 Ch. 75, n.	374
Salmon *v.* Duncombe	11 App. Cas. 627	26
Sangster *v.* Noy	16 L. T. 157	754
Sanguinetti *v.* Pacific Steam Navigation Company	2 Q. B. D. 238	1003
Scaife *v.* Kemp & Co.	[1892] 2 Q. B. 319	972
Scarborough Corporation *v.* Scarborough Rural Sanitary Authority	1 Ex. D. 344	131
Schmaltz *v.* Avery	16 Q. B. 655; 15 Jur. 291	554, 555
Schofield *v.* Orrell Colliery Company	[1909] 1 K. B. 178	522
———— *v.* Londesborough (Earl)	[1896] A. C. 514	1017
Scott *v.* Carritt	82 L. T. 67	326

		PAGE
Scott *v.* London Dock Company	3 H. & C. 596	823
—— *v.* Morley	20 Q. B. D. 120	834
—— *v.* Sampson	8 Q. B. D. 491	958
—— *v.* Stansfield	L. R. 3 Ex. 220	310
Senior *v.* Fountains & Burnley, Ld.	[1907] 2 K. B. 563	521
Serjeant *v.* Nash, Field & Co.	[1903] 2 K. B. 304	897
Serraino & Sons *v.* Campbell	[1891] 1 Q. B. 283	1001
Seward *v.* Vera Cruz (Owners)	10 App. Cas. 59	206
Sharman *v.* Brandt	L. R. 6 Q. B. 720; 40 L. J. (Q.B.) 312	554, 557
Sharp *v.* Grey	9 Bing. 457	662
—— *v.* Johnson & Co.	[1905] 2 K. B. 139	540
Shaw *v.* Great Western Railway Company	[1894] 1 Q. B. 373	991
Shephard, In re	43 Ch. D. 131	904
Shepheard *v.* Whitaker	L. R. 10 C. P. 502	450
Simpkin, Ex parte	2 E. & E. 392	101
Simpson *v.* London General Omnibus Company	42 L. J. (C.P.) 112	659
Singer Manufacturing Company *v.* Clelland	42 Sc. L. R. 757	66
Skinner *v.* London, Brighton and South Coast Railway Company	5 Ex. 787	823
Smith *v.* Cator	2 B. & Al. 778.	606
—— *v.* Lancashire and Yorkshire Railway Company	[1899] 1 Q. B. 141	806
—— *v.* Sieveking	4 E. & B. 945; 5 E. & B. 589	1001
—— *v.* South Normanton Colliery Company	[1903] 1 K. B. 204	542
South African Breweries Company *v.* King	[1899] 2 Ch. 173	219
Southhook Fire-Clay Company *v.* Laughland	(1908) Sess. Cas. (Sc.) 831	643
Southport Corporation *v.* Morris	[1893] 1 Q. B. 359	38
Spackman *v.* Plumstead Board of Works	10 App. Cas. 229	329
Speyer Brothers *v.* Inland Revenue Commissioners	[1908] A. C. 92	607
Spickernell *v.* Hotham	Kay, 669	728
Staffordshire Financial Company *v.* Hunt	[1907] W. N. 258	355
Stanley *v.* Wild	[1900] 1 Q. B. 256	4
Staple of England (Mayor of Merchants of) *v.* Bank of England	21 Q. B. D. 160	1025
Steers *v.* Rogers	10 Rep. Pat. Cas. 245	905
Steinman *v.* Angier Line	[1891] 1 Q. B. 619	989
Stella, The	[1900] P. 161	866
Stewart *v.* London and North-Western Railway Company	3 H. & C. 135	870
—— *v.* Wilson's and Clyde Coal Company	5 F. 120	636, 801
Stiles *v.* Galinski	[1904] 1 K. B. 615	130
Stirling *v.* London and South Western Railway Company	12 Times L. R. 69	870
Stourbridge Canal Company *v.* Wheeley	2 B. & Ad. 792	871
Strong & Co. *v.* Woodifield	[1905] 2 K. B. 350	915
Stuart *v.* Bell	[1891] 2 Q. B. 341	972
Sugden *v.* St. Leonards (Lord)	1 P. D. 154	737

		PAGE
Swan *v.* North British Australian Company	2 H. & C. 175	1025
Swansea Improvements and Tramway Company *v.* Swansea Urban Sanitary Authority	[1892] 1 Q. B. 357	870
Swinfen *v.* Swinfen	27 Beav. 148	582

T.

Tasker *v.* Tasker	[1895] P. 1	831
Taylor *v.* Caldwell	3 B. & S. 826	741
——— *v.* Hamstead Colliery Company	[1904] 1 K. B. 838	280
——— *v.* Pendleton Overseers	19 Q. B. D. 288	347
Thomas *v.* Pritchard	[1903] 1 K. B. 209	10
——— *v.* Thomas	5 Ex. 28	120
Thomson *v.* Davenport	2 Sm. L. C., 11th ed. p. 413	556
——— *v.* Hart	28 Sc. L. R. 28	38
Thurtell *v.* Beaumont	1 Bing. 339	575
Tobin *v.* Reg.	16 C. B. (N.S.) 310	768
Torish *v.* M'Cormack	Lawson's Reg. Cas. 1885 to 1893, p. 144	247
Towse *v.* Henderson	4 Ex. 890; 19 L. J. (Ex.) 163	937
Tozeland *v.* West Ham Union	[1907] 1 K. B. 920	763
Trent *v.* Hunt	9 Ex. 14	486
Turnbull & Co. *v.* Duval	[1902] A. C. 429	396
Tyerman *v.* Smith	6 E. & B. 719	953

U.

Upper Forest and Western Steel and Tinplate Company *v.* Thomas	[1[illegible]] 2 K. B. 631	640

V.

Vagliano *v.* Bank of England	22 Q. B. D. 103; 23 Q. B. D. 243	1019, 1027
Van Gelder *v.* Sowerby Bridge Company	44 Ch. D. 374	486
Vaughan *v.* Campbell, Heatley & Co.	2 Times L. R. 33	935
Vera Cruz, The	9 P. D. 96	201
Victorian Daylesford Syndicate, Ld. *v.* Dott	[1905] 2 Ch. 624	354
V. V. Bread Company *v.* Stubbs	74 L. T. 704	611

W.

Walker *v.* Brogden	19 C. B. (N.S.) 65	966
——— *v.* South Eastern Railway Company	L. R. 5 C. P. 640	780
Wallace *v.* R. & W. Hawthorne Leslie, Ld.	45 Sc. L. R. 547	279
Wallington *v.* Hoskins	6 Q. B. D. 206	848
Wandsworth Board of Works *v.* Hall	L. R. 4 C. P. 85	324
Warncken *v.* R. Moreland & Son, Ld.	[1909] 1 K. B. 184	54
Waterford and Limerick Railway Company *v.* Kearney	12 Ir. C. L. R. 224	407
Watkin *v.* Hall	L. R. 3 Q. B. 396	967

		PAGE
Watkins *v.* Rymill	10 Q. B. D. 178	990
——— *v.* Smith	26 W. R. 692	571
Watney & Co. *v.* Musgrave	5 Ex. D. 241	914
Wegener *v.* Smith	15 C. B. 285; 24 L. J. (C.P.) 25	1002
Wells *v.* Osman	2 Ld. Raym. 1044	814
Werth *v.* London and Westminster Loan Company	5 Times L. R. 521	754
West *v.* Rogers	4 Times L. R. 229	899
West Lancashire Rural Council *v.* Lancashire and Yorkshire Railway Company	[1903] 2 K. B. 394	405
West Middlesex Water Company *v.* Suwerkrop	4 C. & P. 87	606
West Riding of Yorkshire (Inhabitants) *v.* Rex	5 Taunt. 284	407
Westbury *v.* Twigg	[1892] 1 Q. B. 77	370
Westminster Corporation *v.* Gordon Hotels, Ld.	[1906] 2 K. B. 39; [1907] 1 K. B. 910; [1908] A. C. 142	590
——— *v.* Watson	[1902] 2 K. B. 717	143
Wettenhall *v.* Wood	1 Esp. 18	217
White & Co. *v.* Furness, Withy & Co.	[1895] A. C. 40	1003
White and Hales *v.* Islington Corporation	[1909] 1 K. B. 133	628
Wicks *v.* Dowell & Co., Ld.	[1905] 2 K. B. 225	636, 799
Wilford *v.* West Riding of Yorkshire County Council	[1908] 1 K. B. 685	1056
Willcock *v.* Terrell	3 Ex. D. 323	908
Williams *v.* Mercier	51 L. J. (Q.B.) 594; 10 App. Cas. 1	833, 839
Willingale *v.* Norris	[1909] 1 K. B. 57	133
Wilson *v.* McIntosh	[1894] A. C. 129	867
——— *v.* Tavener	[1901] 1 Ch. 578	347
——— *v.* Zulueta	19 L. J. (Q.B.) 49	813
Wood *v.* Durham (Earl)	21 Q. B. D. 501	972
Wool Exchange *v.* Youla Wools	Unreported	911

Y.

Young *v.* Grote	4 Bing. 253	1017
——— *v.* Kershaw	81 L. T. 531	574
——— *v.* Moore	2 Wils. 67	216

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

ULMANN *v.* COWES HARBOUR COMMISSIONERS.

1909
Feb. 5.

Crown—Privilege of—Action between Subjects involving Rights of the Crown—Right of Crown to transfer Action to Revenue Side.

A statement of claim alleged that the plaintiff was in possession of an oyster fishery and oyster beds in the estuary of a river and was the owner of large quantities of oysters that he had placed there, and that the defendants, being the harbour commissioners of the said estuary, wrongfully caused certain vessels to anchor upon the oyster beds, whereby the oysters were damaged. The Attorney-General claimed to have the action removed to the Revenue side of the King's Bench Division upon the suggestion that the rights of the Crown as the owner of the foreshore might be thereby affected:—

Held that, although the plaintiff did not claim to be in possession under any title, and the defendants did not justify their acts under the authority of the Crown, the Crown was entitled to have the action removed.

Motion by the Attorney-General to remove an action of *Ulmann* v. *Cowes Harbour Commissioners* to the Revenue side of the Court.

By an indenture of lease dated September 5, 1893, the

1909

ULMANN v. COWES HARBOUR COMMISSIONERS.

corporation of Newport in the Isle of Wight purported to grant to the plaintiff Ulmann a lease of a certain oyster fishery and oyster beds in the river Medina.

In October, 1903, the Attorney-General filed an information praying a declaration that the Crown was seised in fee of the foreshore and bed of the said river below ordinary high water mark, and claimed an injunction against the corporation from purporting to make any conveyance or lease thereof.

In September, 1907, the plaintiff Ulmann brought the above action in the King's Bench Division against the Cowes Harbour Commissioners for damage done to his oysters. The statement of claim alleged that the plaintiff was in possession of the said oyster fishery and oyster beds under and by virtue of the lease granted to him by the corporation of Newport as above mentioned and complained of the grievances below set out in the amended statement of claim, and claimed damages and an injunction.

In February, 1908, the Attorney-General moved the Court to transfer the action to the Revenue side on the ground that the rights of the Crown were thereby involved.

Bray J. ordered the motion to stand adjourned to allow of the plaintiff amending his pleading and claiming damages for interference with his possession of the oyster beds without reference to any claim of title under the lease from the corporation. The plaintiff accordingly amended his pleading by striking out all reference to the said lease and the claim for an injunction, and the statement of claim as so amended alleged that the plaintiff was an oyster merchant and that he was in occupation of an oyster fishery and oyster beds in the river Medina, Isle of Wight, and was the owner of a large number of oysters in the said fishery that he had placed thereon; that the oyster fishery and beds were situate within Cowes Harbour; that the defendants had the control of the berthing, mooring, and anchoring of all vessels coming into Cowes Harbour; that the defendants by their harbour-master negligently and improperly directed certain yachts to proceed to berths in the river Medina, where the said oyster beds were, and cast their anchors over the said beds, whereby the oysters were damaged; and the plaintiff claimed damages.

The defendants, in addition to traversing the material allegations of the claim, alleged that the acts complained of were done in pursuance of their statutory authority and duty under the Cowes Harbour Act, 1897, under which they were incorporated; that all the subjects of the King had the right, subject to the control and regulations of the defendants under the said Act, to berth, moor, and anchor in the said harbour or any part thereof; and that for the due enjoyment of their rights the whole area of the harbour was required, and that the acts complained of could not be discontinued without interfering with those rights.

The Attorney-General renewed his motion on the pleadings as amended.

Sir W. S. Robson, *A.-G.*, and *Austen-Cartmell*, on behalf of the Crown. The subject-matter of the action touches the profit of the Crown, and therefore the Crown is entitled to have the action removed to the Revenue side in order that the Crown may become a party to the litigation. As possession of the bed of the river is consistent with its being had under colour of title, unless the plaintiff expressly negatives that his possession is so claimed, the rights of the Crown as the owner of the foreshore may be involved. In *Attorney-General* v. *Hallett* (1) an action of *Hallett* v. *Vigne* was brought in the Common Pleas. It was an ordinary action of trespass to land. The defendant pleaded that the locus in quo was within the forest of Waltham, of which the Queen was seised in fee in right of her crown, and justified the trespass as the servant and by command of the Queen. The Court ordered the action to be removed into the Exchequer on the allegation of the Attorney-General that the profit of the Crown came in question in the cause. That case was treated by Channell B. in *Attorney-General* v. *Barker* (2) as having "decided that the Crown had a right to interfere and exercise some control, and that upon a mere suggestion of the Attorney-General made at the bar that the Crown had an interest." The Court will order the transfer to the Revenue side of an action between subjects involving the rights of the Crown even after

(1) (1846) 15 M. & W. 97. (2) (1872) L. R. 7 Ex. 177, at p. 184.

1909

ULMANN v. COWES HARBOUR COMMISSIONERS.

the action has been tried and judgment delivered: *Stanley* v. *Wild*. (1)

Horridge, K.C., and *Nelson*, for the plaintiff Ulmann. As the plaintiff has abandoned his claim of title under a lease, there is no ground for the Crown's interference. The Attorney-General must satisfy the Court that the rights of the Crown will in fact be affected by the proceedings between the subjects; it is not enough merely to suggest that they may be. In the cases cited by the Attorney-General it was clear upon the pleadings that the rights of the Crown were involved. In both cases the defendants pleaded the Crown's title. In *Attorney-General* v. *Barker* (2) the Queen as lady of a manor granted to two licensees power to enter certain lands in the manor and dig for minerals, making customary compensation for surface damage to the copyholder and terre-tenant. The licensees entered without the consent of either copyholder or terre-tenant and began mining operations, whereupon the terre-tenant commenced an action of trespass against them. The Attorney-General then filed a bill on the Equity side of the Exchequer to restrain the action. It was held that, as the rights of the Crown were involved in the proceedings in the action, the Sovereign was entitled to be an actor in any litigation affecting those rights, and that an injunction must issue. What Channell B. there meant by saying that the Crown had a right to interfere "upon a mere suggestion of the Attorney-General" that the Crown had an interest was that it was enough if the Attorney-General so stated in open Court, pointing to the pleadings in support of his statement, and that it was not necessary to embody the statement in an affidavit. Here it is not necessary for the plaintiff to rely on any title in himself; mere possession is sufficient to support the action. For even if he was a trespasser in depositing his oysters where he did, that would not justify the defendants in wilfully or negligently causing vessels to damage the oysters, there being other mooring places in the harbour where the vessels might have anchored: *Mayor of Colchester* v. *Brooke*. (3)

The effect of removing the action to the Revenue side will be

(1) [1900] 1 Q. B. 256. (2) L. R. 7 Ex, 177.
(3) (1846) 7 Q. B. 339.

to stay it until after the information has been heard. As that information was filed nearly six years ago and has not been proceeded with, the action may be indefinitely delayed.

J. A. Simon, K.C., and *Ernest Charles*, for the defendants.

Sir W. S. Robson, A.-G., in reply, undertook that the information should be proceeded with without delay.

CHANNELL J. I am of opinion that the motion to remove into the Revenue side of this Court the action of *Ulmann* v. *Cowes Harbour Commissioners* must be allowed upon the ground that the Attorney-General suggests, that the rights of the Crown may be involved and that it does not appear that they cannot be so involved. I do not think it is for the Attorney-General to establish affirmatively that they will necessarily be interfered with, because I think the authorities shew that it is sufficient for him to suggest that in his judgment the title or rights of the Crown will be involved. It must be borne in mind that it is only a question of the tribunal. The removal does not stop the proceedings which the subject has commenced, it only provides for their continuance in a particular Court. Although it is not necessary for me to decide it in this case, I think that, if it appeared upon the proceedings that by no possibility could the rights of the Crown be involved, the Court would probably not be bound to remove the proceedings into this Court; but I think that at any rate to entitle the Court to refuse the Attorney-General's motion it must appear that the rights of the Crown cannot be involved. Now in this case, upon the pleadings as they stand in their amended form, the plaintiff complains only of a wrong done to his actual possession. But to his possession of what? He cannot rely on possession of the oysters which he says have been damaged. In order to shew a cause of action he must shew possession of a portion of the bed of the harbour or else of an incorporeal right of several fishery. Unless he can shew possession of either one or the other, the oysters which he complains are damaged are not his property, for they are simply fish which any subject of the King is entitled to get if he can. It is impossible, therefore, to say that the action is not founded on the possession of something in which the Crown has an interest. That being so,

1909

ULMANN v. COWES HARBOUR COMMISSIONERS.

Channell J.

as the rights of the Crown may be involved—whether in the result they will be involved or not is uncertain, but as they may be involved—the Attorney-General is entitled to exercise his right of having the action removed into this Court. Then when it is moved into this Court there arises another question, whether it ought to be stayed. That depends upon whether the two proceedings cover the same ground. When that is the case one should be stayed. But I am satisfied here that the action for damages and the information by the Crown, though they deal with a similar subject, do not raise the same issues, and under those circumstances it would be improper that the action should be stayed. The two proceedings must go on, but they must be tried together. The Attorney-General has told us that he intends to proceed with the information; therefore there will be no injustice in adopting that course. I therefore make the order that the action be moved into this Court; that it be not stayed; but that it be tried concurrently with the information, with liberty to the plaintiff to apply in case there is unreasonable delay in the prosecution of the information.

Order accordingly.

Solicitor for Attorney-General: *Solicitor to the Board of Trade.*

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendants: *Clarkson, Greenwell & Co., for Damant & Sons, Cowes.*

J. F. C.

ATTORNEY-GENERAL *v.* CLARK.

1909
Feb. 11.

Inland Revenue—Crown—Duties in respect of Dogs—Penalty for keeping Dog without Licence—Information dismissed—Order to pay Costs—Costs paid to Clerk to Justices—Debt due to Crown—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *ss.* 18, 31—*Dog Licences Act*, 1867 (30 & 31 *Vict. c.* 5), *ss.* 4, 8—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 33, *sub-s.* 2.

On informations laid by an officer of Inland Revenue under s. 8 of the Dog Licences Act, 1867, against three defendants respectively for keeping a dog without a licence the justices dismissed the informations and ordered the defendants to pay certain sums as costs under s. 16 of the Summary Jurisdiction Act, 1879. The defendants paid the costs to the clerk to the justices.

On an information filed by the Attorney-General claiming from the clerk to the justices as a debt due to the Crown the residue of the sums so received by him after deducting the amount of certain fees authorized to be taken by him by an authorized table of fees and allowances:—

Held, that the Crown was entitled to recover.

Special Case stated by agreement between the parties.

An information was filed by the Attorney-General claiming from the defendant as a debt due to His Majesty three several sums of 14*s.*, 4*s.*, and 14*s.*, in all amounting to 1*l.* 12*s.*

The defendant was clerk to the justices of the Brentford division of Middlesex.

On June 6, 1907, one Spencer Mitchell appeared to an information exhibited before the justices by an officer of Inland Revenue on behalf of the Commissioners of Inland Revenue charging him with keeping a dog without having a licence for it contrary to s. 8 of the Dog Licences Act, 1867. The justices after hearing the evidence dismissed the information and ordered Mitchell to pay the sum of 20*s.* as costs under s. 16 of the Summary Jurisdiction Act, 1879. On the same day orders to pay the sums of 10*s.* and 20*s.* respectively as costs were made against two other persons by the justices upon informations exhibited against them by the officer of Inland Revenue under similar circumstances and dismissed by the justices.

The justices having in announcing their decision awarded

1909

ATTORNEY-GENERAL v. CLARK.

costs, no application was made by the officer of Inland Revenue for costs. He was not represented by a solicitor.

The sums so ordered by the justices to be paid were paid to the defendant by Mitchell and the two other persons against whom the orders were made. The orders were not drawn up.

An authorized table of fees and allowances to be taken by clerks to justices for the county of Middlesex was in force. The fee authorized by this table to be taken in each case by the defendant was the sum of 6*s*.

It was admitted by the Attorney-General that the defendant was entitled to retain the fees mentioned in the table, together amounting to 18*s*., but he claimed from the defendant on behalf of the Crown the residue of the sums paid to him, amounting to 1*l*. 12*s*.

The question for the opinion of the Court was whether the Crown was entitled to 1*l*. 12*s*., the residue of the sums so paid to the defendant.

Sir S. T. Evans, *S.-G.*, and *W. Finlay*, for the informant. Sect. 18 of the Summary Jurisdiction Act, 1848 (1), gives power

(1) Summary Jurisdiction Act, 1848, s. 18: "In all cases of summary conviction or of orders made by a justice or justices of the peace it shall be lawful for the justice or justices making the same, in his or their discretion, to award and order in and by such conviction or order that the defendant shall pay to the prosecutor or complainant respectively such costs as to such justice or justices shall seem just and reasonable in that behalf; and in cases where such justice or justices, instead of convicting or making an order as aforesaid, shall dismiss the information or complaint, it shall be lawful for him or them, in his or their discretion, in and by his or their order of dismissal, to award and order that the prosecutor or complainant respectively shall pay to the defendant such costs as to such justice or justices shall seem just and reasonable; and the sums so allowed for costs shall in all cases be specified in such conviction or order, or order of dismissal aforesaid, and the same shall be recoverable in the same manner and under the same warrants as any penalty or sum of money adjudged to be paid in and by such conviction or order is to be recoverable; and in cases where there is no such penalty or sum to be thereby recovered, then such costs shall be recoverable by distress and sale of the goods and chattels of the party, and in default of such distress by imprisonment, with or without hard labour, for any time not exceeding one calendar month, unless such costs shall be sooner paid."

Sect. 31: "In every warrant of distress to be issued as aforesaid the

to the justices to award costs to the prosecutor in all cases

1909

ATTORNEY-GENERAL v. CLARK.

constable or other person to whom the same shall be directed shall be thereby ordered to pay the amount of the sum to be levied thereunder unto the clerk of the division in which the justice or justices issuing such warrant shall usually act; and if any person convicted of any penalty, or ordered by a justice or justices of the peace to pay any sum of money, shall pay the same to any constable or other person, such constable or other person shall forthwith pay the same to such clerk; and if any person committed to prison upon any conviction or order as aforesaid for non-payment of any penalty, or of any sum thereby ordered to be paid, shall desire to pay the same and costs before the expiration of the time for which he shall be so ordered to be imprisoned by the warrant for his commitment, he shall pay the same to the gaoler or keeper of the prison in which he shall be so imprisoned, and such gaoler or keeper shall forthwith pay the same to the said clerk; and all sums so received by the said clerk shall forthwith be paid by him to the party or parties to whom the same respectively are to be paid, according to the directions of the statute on which the information or complaint in that behalf shall have been framed; . . . ."

Dog Licences Act, 1867, s. 4: "The said duties" (i.e., the duties imposed by the Act in respect of dogs) "and licences shall be excise duties and licences, and shall be under the management of the Commissioners of Inland Revenue; and all the powers, provisions, clauses, regulations, and directions contained in any Act relating to excise duties or licences, or to penalties under excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the duties hereby granted, and the licences relating thereto, and the penalties hereby imposed, so far as the same are applicable, and shall be observed, applied, and enforced for and in the collecting, regulating, and recovering of the duties hereby granted, and the licences relating thereto, and the penalties hereby imposed, and otherwise in relation to the said duties, licences, and penalties, so far as the same shall be consistent with and not superseded by the express provisions of this Act," as fully and effectually as if the same had been herein repeated and specially enacted with reference to the said last-mentioned duties, licences, and penalties respectively: . . . ."

Sect. 8: "If any person shall keep a dog without having in force a licence granted under this Act authorizing him so to do, ... he shall for every such offence forfeit the sum of five pounds; . . . ."

Summary Jurisdiction Act, 1879, s. 16:—"If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment,—(1.) The court, without proceeding to conviction, may dismiss the information, and, if the court think fit, may order the person charged to pay

1909

ATTORNEY-GENERAL v. CLARK.

of summary conviction or orders, and *Thomas* v. *Pritchard* (1) shews that the Summary Jurisdiction Acts apply to Crown prosecutions relating to the revenue. The form No. 22 of the order of dismissal of an information in the schedule to the Summary Jurisdiction Rules, 1886, follows the language of s. 18 of the Summary Jurisdiction Act, 1848. Sect. 4 of the Dog Licences Act, 1867, enacts that the duties payable in respect of dogs shall be excise duties and under the management of the Inland Revenue Commissioners, and that the provisions of any statute relating to penalties under Excise Acts shall apply to penalties imposed by the Act of 1867. Sect. 53 of the Summary Jurisdiction Act, 1879, applies the Summary Jurisdiction Acts to (inter alia) revenue prosecutions. Although the penalty was not inflicted, it was incurred within the meaning of s. 33, sub-s. 2, of the Inland Revenue Regulation Act, 1890, and the Crown is therefore entitled to the costs ordered to be paid in respect of it. The officer of Inland Revenue, who was the nominal prosecutor, was the servant of the Crown, and he is liable to account to the Crown for the costs payable to him. The informations were framed under the Dog Licences Act, 1867, and the Summary Jurisdiction Acts; and s. 4 of the Act of 1867 coupled with s. 31 of the Summary Jurisdiction Act, 1848, and s. 53 of the Summary Jurisdiction Act, 1879, shews that he was the only person entitled to the costs, and, he being merely the servant of the Crown, the Crown is entitled to them. [Sect. 235 of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), was also referred to.]

Eustace Hills, for the defendant. No application was made at the hearing before the justices that these sums of which the defendant is in possession should be paid to the prosecutor, nor was any order drawn up. Sect. 16 of the Summary Jurisdiction

such damages, not exceeding forty shillings, and such costs of the proceeding, or either of them, as the court think reasonable; . . . ."

Inland Revenue Regulation Act, 1890, s. 33, sub-s. 2: "All fines and penalties and the proceeds of all forfeitures incurred under any such Act,"—i.e., under any Act relating to Inland Revenue—"and all costs, charges, and expenses payable in respect thereof or in relation thereto respectively, shall be accounted for and paid to the Commissioners or as they direct."

(1) [1903] 1 K. B. 209.

Act, 1879, which applies where an information is dismissed, does not contain any provision that costs are to be paid to the prosecutor, whereas s. 18 of the Summary Jurisdiction Act, 1848, contains an express provision to that effect where there is a conviction. Therefore there must be a conviction in order that the prosecutor may be entitled to the costs. Even if the orders had been drawn up the Crown would not have been entitled to recover the sums from the defendant. In the definition in s. 49 of the Summary Jurisdiction Act, 1879, the expression "fine" includes any pecuniary penalty under a conviction, but in order that there may be a fine there must be a conviction. There was therefore no fine, penalty, or forfeiture, nor any costs, charges, or expenses in relation thereto incurred within s. 33 of the Inland Revenue Regulation Act, 1890. As between itself and the Inland Revenue officer the Crown is not entitled to payment of these sums by him, and therefore they are not recoverable against the defendant. If it had been the intention that costs should be recoverable by the Crown where no fine is inflicted, the language of s. 33 of the Act of 1890 would be similar to that of s. 34 of that statute, where the expression "proceedings for the recovery of any fine" is used, shewing that the section includes a case where a fine is not inflicted. It is a condition precedent to the jurisdiction of the justices arising to order the defendant to pay costs under s. 16 of the Summary Jurisdiction Act, 1879, that the information should be dismissed. But in s. 33 of the Inland Revenue Regulation Act, 1890, a conviction is contemplated.

CHANNELL J. I am of opinion that this case presents no difficulty. The justices exercised the power which they have under s. 16 of the Summary Jurisdiction Act, 1879, of saying that although the three defendants to the informations laid by the officer of Inland Revenue had in fact kept dogs without a licence, yet each case would be met without the infliction of a fine by ordering them to pay such costs of the proceedings as the justices thought reasonable.

The "costs of the proceeding" mentioned in s. 16 of the Summary Jurisdiction Act, 1879, must be costs which have been

1909

ATTORNEY-GENERAL v. CLARK.

Channell J.

incurred and are meant, I think, to include the fee properly payable to the clerk in reference to the proceeding. That appears to be 6*s.* in respect of each information, and therefore the justices may be assumed to have ordered 18*s.* to be paid as the Court fees. But they ordered three several sums of 20*s.*, 10*s.*, and 20*s.*, making a total of 50*s.*, to be paid. As to 1*l.* 12*s.* the excess over the 18*s.* Court fees, there was no power to order it to be paid to any one but the officer of Inland Revenue, the prosecutor, because the power to order costs must refer to the costs that have been incurred, and it is obvious in the present case they could not be a sum such as, for example, 100*l.* in each case. I do not think the justices would have had power to make an order against either of the persons against whom the informations were laid, saying, in effect, "We will not fine you, but we will make you pay 100*l.* as costs." That order could not be made where the 100*l.* costs had not been incurred by any one. The natural limit which exists as to ordering costs of proceedings is an amount up to the sum actually incurred, and the only person who could have incurred anything in the present case was the officer of Inland Revenue, the prosecutor.

With regard to the fact that no order was drawn up, there was no occasion to do that, inasmuch as each defendant was prepared to pay. The only use of drawing up an order would have been to enforce payment, if it had been necessary to do so. But I must deal with the matter as if an order had been drawn up in each case in the only possible form, namely, to pay the sums to the officer of Inland Revenue.

In form the information claims the residue, after deducting the clerk's fees, as payable to the Crown. For the purpose of the proceedings the officer of Inland Revenue represented the Crown, and there is therefore no difference in substance between the claim of the Crown and that of the officer of Inland Revenue. If the officer of Inland Revenue's name had been put into the order as the claimant of the residue after allowing for the clerk's fees, he in all probability would have been the person in whose name it must have been enforced, but nevertheless he would have been the servant of the Crown. As between him and the Crown I do not think any statutes are

necessary to shew that he would have had to account for it. But if it be necessary to rest the claim of the Crown upon statute, I think those which have been cited in argument are applicable, and that there is no real difficulty in holding that the words in s. 33, sub-s. 2, of the Inland Revenue Act, 1890, enacting that "fines and penalties incurred . . . . and all costs . . . . payable in respect thereof or relation thereto" are to be accounted for and paid to the Inland Revenue Commissioners are applicable to the very special case where no penalty has been inflicted, but the payment of costs in lieu of penalty has been ordered. The words are not exactly chosen to meet that case, but if the officer of Inland Revenue had received the 1*l.* 12*s.* he would have been bound to pay it over to the Crown. Consequently I think that this information should be allowed, and there must be judgment for the Crown for 1*l.* 12*s.*

Judgment for informant.

Solicitor for informant: *Solicitor of Inland Revenue.*
Solicitor for defendant: *Sir Richard Nicholson.*

J. E. A.

1909
March 2.

Ex parte BOTTOMLEY and Others.

Criminal Law—Practice—Abortive Trial—Rehearing—Evidence on former Hearing—Evidence on Rehearing.

Several persons having been charged with conspiracy to defraud, a summons was issued, and the hearing commenced before a magistrate. When the inquiry had lasted a considerable time and the evidence of a large number of witnesses had been taken, the magistrate fell ill and was unable to continue the hearing, which had to be recommenced before another magistrate. At the commencement of the rehearing counsel for the prosecution proposed to take the following course:—To recall some of the witnesses called at the first hearing; to reswear them; to read to them their depositions taken at that hearing, directing them to correct the evidence if and where it was inaccurate; to ask them any additional questions that might be thought advisable; then to tender these witnesses for cross-examination, with liberty for the prosecution to re-examine where necessary; and then to proceed with the oral examination of those witnesses whom the prosecution intended to call but had not called on the first hearing:—

Held, that there was nothing illegal in the course proposed, and that to accede to the proposal if he thought it expedient in the interests of justice so to do was within the discretion of the magistrate, with which the Court would not interfere.

Motion on behalf of Horatio Bottomley, George Francis Fewings, William Albert Stevenson, and Dalton Easum for rules, first under s. 5 of the Justices Protection Act, 1848 (1), and

(1) Justices Protection Act, 1848 (11 & 12 Vict. c. 44), s. 5: "And whereas it would conduce to the advancement of justice . . . . if some simple means . . . . were devised by which the legality of any act to be done by such justices might be considered and adjudged by a Court of competent jurisdiction, and such justice enabled and directed to perform it without risk of any action or other proceeding being brought or had against him: Be it therefore enacted, that in all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party requiring such act to be done to apply to Her Majesty's Court of Queen's Bench, upon an affidavit of the facts, for a rule calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if after due service of such rule good cause shall not be shown against it, the said Court may make the same absolute, with or without or upon payment of costs, as to them shall seem meet; and the said justice or justices upon being served with such rule absolute shall obey the same, and

1909

BOTTOMLEY, *Ex parte.*

secondly for writs of mandamus, calling upon Alderman Sir Horatio Davies to take the evidence of the witnesses called upon an inquiry then proceeding before the alderman, and to hear and determine the matter of the inquiry according to law.

The applicants had been charged at the Guildhall in the city of London with conspiracy to defraud. A summons was issued, and the hearing commenced on December 1, 1908, before Alderman Sir George Smallman. When the inquiry had continued for twenty-four days and the evidence of one hundred witnesses had been taken, Sir G. Smallman fell ill and was unable to continue the hearing, and his place was taken by Alderman Sir Horatio Davies.

On Sir H. Davies taking his seat a discussion arose as to how the inquiry was to proceed. Counsel for the prosecution proposed to recall some of the witnesses called before Sir G. Smallman; then, having resworn them, to read to them their evidence which had been taken down in writing, directing them to correct the evidence if and where it was inaccurate; to ask them any additional questions that might be thought advisable; to allow the applicants or their counsel to cross-examine, with liberty to counsel for the Crown to re-examine these witnesses if they should think fit; and then to proceed with the oral examination of the witnesses who had not been called before Sir G. Smallman.

Counsel for the applicants objected to this course and contended that the only course open to the alderman was to take de novo the oral evidence of all the witnesses whom counsel for the Crown thought fit to call.

The alderman signified his intention of adopting the course suggested by counsel for the Crown, but adjourned the inquiry in order that counsel for the applicants might have an opportunity of moving the Court for the rules above mentioned.

F. E. Smith, K.C. (*W. A. Casson* and *G. W. H. Jones* with him), for Bottomley, Fewings, and Stevenson. The course which the alderman proposes to take is open to the gravest objection,

---

shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule, and done such act so thereby required as aforesaid."

1909

BOTTOMLEY, *Ex parte.*

which cannot be better stated than in the words of Sir John Coleridge delivering the judgment of the Judicial Committee of the Privy Council in *Reg.* v. *Bertrand.* (1) In that case, the jury in a trial for felony having disagreed, a fresh jury was impanelled and a fresh trial had. On the second trial, some of the witnesses having been resworn, the evidence given by them at the first trial was read over to them from the judge's notes. The witnesses were asked all in turn whether what was read was true, and were submitted, at the pleasure of the counsel on either side, to fresh oral examination and cross-examination. Sir John Coleridge said (2): "The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of the prisoner, judge, and jury, is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects; who, indeed, will not necessarily be the same on both trials; it is, in short, or it may be, the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it. . . . . Their Lordships do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the jury which was adopted on this trial." All that was there said is applicable to the present case. To the same effect is the judgment of Wills J. in *In re Guerin.* (3) There, upon proceedings for the extradition of a prisoner charged with larceny in France, evidence of the crime was heard before one magistrate and evidence of the prisoner's nationality before another magistrate, who eventually issued a warrant for the extradition of the accused. Wills J. in giving judgment said (4): "It is contrary to all my ideas and experience of justice for one magistrate to take up an inquiry commenced before another. Every

(1) (1867) L. R. 1 P. C. 520
(2) L. R. 1 P. C. at p. 535.
(3) (1888) 58 L. J. (M.C.) 42.
(4) 58 L. J. (M.C.) at p. 44.

1909

BOTTOMLEY, *Ex parte.*

prisoner is entitled to a judicial decision by a magistrate as to whether a prima facie case is made out against him. The proceeding, although not final, is a judicial proceeding, and can only be satisfactorily conducted by one who has heard the case throughout and heard and seen for himself the witnesses and their demeanour. The principle of the common law is clear on the matter. The statute 11 & 12 Vict. c. 42 permits the depositions taken before magistrates of one jurisdiction to be transmitted to the magistrates of another jurisdiction to which the prisoner is committed; but that statute does not apply to proceedings before magistrates of the same jurisdiction. Here there had been eleven different hearings; there may, therefore, according to the argument addressed to the Court, have been eleven different magistrates engaged on the part hearing of facts of this case—a proceeding which could never have been intended nor tolerated." In *Reg.* v. *Jeffreys* (1) the mere reading over of evidence already taken to a magistrate who was not present when it was given was considered an irregularity; it is true that, that being a civil case, the irregularity could be waived, which it could not be in a criminal case like the present. The practice of reswearing witnesses on a second trial and reading over to them their evidence on a former trial is also deprecated in Archbold's Criminal Pleading, 23rd ed., p. 416. It is open to the further objection that the evidence given on the second trial must of necessity be given in answer to a series of long leading questions, which are not admissible: see Archbold's Criminal Pleading, 23rd ed., p. 417; Stephen's Digest of the Law of Evidence, 6th ed., art. 128; Taylor on Evidence, 10th ed., s. 1405. In the present case it will be impossible for the alderman to form any adequate opinion of the weight and value of the evidence from merely reading over the depositions taken on the former hearing; and a great injustice will be done to the applicants if they are committed for trial, even assuming their ultimate acquittal, upon such an irregular hearing as that proposed.

Hemmerde, K.C. (*Leslie Scott* with him), for the applicant Easum, adopted the foregoing argument.

(1) (1870) 22 L. T. (N.S.) 786.

1909

BOTTOMLEY, *Ex parte.*

PHILLIMORE J. In this case Mr. F. E. Smith moved on behalf of Messrs. Bottomley, Fewings, and Stevenson, and Mr. Hemmerde moved on behalf of Mr. Easum, for two rules, one under s. 5 of the Justices Protection Act, 1848, and the other for a mandamus, to be directed to Alderman Sir Horatio Davies, before whom a criminal prosecution against their clients, the applicants, was being heard at the Guildhall. The prosecution was commenced before Alderman Sir George Smallman, but after a hundred witnesses had been examined and cross-examined Sir G. Smallman unfortunately fell seriously ill, and his place was taken by Sir H. Davies. On the recommencement of proceedings before Sir H. Davies, who had taken his seat in place of his brother alderman, a discussion arose which has led to these applications.

In substance it is suggested on behalf of the applicants that the Court should prevent the alderman from taking the evidence, if he is so minded and if he thinks it right, of some or all of the one hundred witnesses who have already been sworn in the proceedings, in the manner in which he proposes to take it, namely, by allowing them to be recalled before him and allowing their depositions to be read over to them, with instructions to the witnesses to correct their depositions if they found them incorrect in any particular, and giving liberty to the Crown and of course to the applicants or their counsel further to examine or cross-examine the witnesses. I should explain that when I speak of depositions I use the word in its proper sense as including not only evidence in chief, but also evidence given in cross-examination and re-examination.

We approach this question on the general principles well laid down by Cockburn C.J. in the case of *Reg.* v. *Carden* (1) in these words: "In cases where a magistrate has authority to hear and determine a matter, but refuses to do so to the frustration of justice, we have undeniably jurisdiction in the exercise of our mandatory authority to direct him to hear and determine. In the present case we are applied to, while the case is under consideration, to interfere and direct the magistrate as to the course he shall pursue. While we have authority to issue a mandamus

(1) (1879) 5 Q. B. D. 1, at p. 5.

1909

BOTTOMLEY, *Ex parte.*

Phillimore J.

to hear and determine, we have no authority, as it seems to me, to control the magistrate in the conduct of the case, or to prescribe to him the evidence which he shall receive or reject, as the case may be. We are not called upon here to exercise anything in the nature of appellate jurisdiction. That could only be done when the case was at an end, in such cases as may come within our appellate jurisdiction. We are called upon to issue a mandamus commanding the magistrate to take a certain course while the case is pending. This is, in my opinion, an application of a very anomalous character. In the case of *Ex parte Ellissen* (1), which has been referred to, it seems to me that this Court went to the utmost limits of its mandatory jurisdiction, and I should be extremely unwilling to extend the doctrine of that case to any other set of circumstances." The weight of those remarks is not diminished when it is remembered that the question in that case was not merely one of procedure, but was one of the most vital importance, the refusal to admit substantive evidence in a preliminary inquiry before a magistrate with the object of procuring the committal of a prisoner for trial. Approaching the present case under the guidance of these general principles, we have to see whether any case has been made out for interfering with the discretion of the alderman in the conduct of these proceedings. We see none. We can find no authority, and counsel in the time at their disposal for inquiry—which they say has been short, but which I think has been sufficient—have found no authority, to shew that, if a magistrate elects to take the course which the applicants seek to prevent, he will be doing anything wrong. The expressions most in favour of the applicants are to be found in the judgment of Wills J. in *In re Guerin* (2) and the judgment of the Privy Council delivered by Sir John Coleridge in *Reg.* v. *Bertrand.* (3) Neither of those decisions, however, suggests that this practice is contrary to law. Indeed, as I read the judgment in *Reg.* v. *Bertrand* (3), it tends to the opposite conclusion. Their Lordships expressed a wish to discourage generally the mode of laying the evidence before the

(1) Not reported, but referred to in Starkie on Libel and Slander, 4th ed. (1876), p. 592.

(2) 58 L. J. (M.C.) 42.

(3) L. R. 1 P. C. 520.

1909

BOTTOMLEY, *Ex parte.*

Phillimore J.

jury which had been adopted at the trial in that case; but those discouraging remarks must be read according to the subject-matter there under discussion. There had been in the Supreme Court of New South Wales a trial for murder, in which the evidence had been given at very considerable length. The jury had disagreed and had been discharged, and the prisoner was again brought for trial before the Court. At the second trial the presiding judge had allowed the evidence of several of the witnesses who had been called as witnesses for the Crown at the first trial to be taken in the following manner. Each of those witnesses was placed in the witness-box and was then sworn in the usual manner; the judge then informed the witness that he intended to read over the notes which he had taken of the evidence given by the witnesses at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so; and he also informed counsel for the prisoner and counsel for the Crown that if either of them wished to ask the witness any questions he could do so. The hearing of the evidence on the former trial had taken nearly three days, and the mere reading of that evidence at the second trial threatened to be so prolonged that in the view of the Privy Council there was danger that the attention of the jury might flag during the process. But though their Lordships discourage the practice generally on other grounds, particularly on the ground that the jury cannot see the demeanour of a witness whose evidence is merely read to him, yet there is not one word in the judgment to say that the course which the judge in that case adopted, and which the alderman in the present case proposes to follow, is in any way illegal.

There is therefore no authority that the course proposed to be taken is contrary to law. To read over to a jury on a second trial the evidence taken at a former trial is a course to which we are all well accustomed, and the practice is well established in this sense, that it is a matter within the general discretion of the presiding judge to be exercised according to the demands of justice. The objection was taken that to put to a witness in direct examination on the second trial his evidence given on

the former trial is to put to him a long leading question, and that this is not to be allowed. But what is the law as to leading questions? Sir James Stephen, whose authority is of the highest, in his Digest of the Law of Evidence, 6th ed., art. 128, p. 146, says this: "Leading Questions.—Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in examination in chief, or in re-examination, except with the permission of the Court, but such questions may be asked in cross-examination." The corresponding article in the first edition is to the same effect. Then there is the opinion expressed in Taylor on Evidence, 10th ed., s. 1405, pp. 1012, 1013. The authority of Taylor is not so high as that which I have just cited, and before accepting his statement as conclusive one would prefer to look at the cases cited in support of his proposition. Those cases are *Lawder* v. *Lawder* (1), *Ohlsen* v. *Terrero* (2), and *Moody* v. *Rowell.* (3) He sums up the question in these words: "Indeed, the judge has a discretionary power,—not controllable by the Court of Appeal,—of relaxing the general rule, whenever, and under whatever circumstances, and to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require." With these authorities before us we see no reason for saying that the alderman is bound to deprive himself of the means of shortening a very long case by putting to the witnesses in the form of a long leading question their depositions taken on the former hearing. To do so is often convenient in the interests of justice; it is a practice which is well known and is supported by the statement arguendo in *In re Guerin* (4) of counsel so familiar with the procedure in criminal cases as Mr. Poland and Mr. Gill. That case is reported in the *Law Journal* and in the *Law Times.* The statement of the practice appears in the *Law Times* in these words: "If a case is heard before two different magistrates, the witnesses who gave their evidence before the first should be resworn, and give

(1) (1855) 5 Ir. C. L. R. 27.
(2) (1874) L. R. 10 Ch. 127.
(3) (1835) 17 Pick. (Amer.) 490.
(4) 58 L. J. (M.C.) 42.

1909

BOTTOMLEY, *Ex parte.*

PHILLIMORE J.

their evidence de novo before the second magistrate." (1) The expression "give their evidence" in that passage is a little ambiguous; but the statement as it appears in the *Law Journal* is free from all doubt. It is in these words: "The practice in the case of rehearing before another magistrate is to reswear the witnesses and read over their evidence, as in *Rex* v. *Smith*. (2) In *Reg.* v. *Jeffreys* (3) the Court held this was the proper course." (4) We therefore do not think that there is any objection in law to the course which the alderman proposes to take. It is a matter for his discretion: it will be for him to consider whether he thinks it desirable that some particular witness should be called and examined in some particular manner; whether the reading of the cross-examination of any particular witness should be postponed till after his examination is taken viva voce; or whether the whole or any part of the evidence of any particular witness should be taken orally de novo. We do not interfere with his discretion in any of these respects, nor with respect to the number of witnesses which he may think fit to hear. If the witnesses are credible, two or three are often enough to establish a prima facie case, and other witnesses are called simply because they may be called at the trial and in the interests of the prisoner on the ground that it is fair that he should have as far as possible notice at the preliminary investigation of the evidence that may be adduced against him at the trial of the indictment. That benefit has been secured in this case to the applicants by the hundred witnesses already heard. The alderman will now in his discretion determine what witnesses shall be heard and how their evidence shall be taken. These rules will therefore be refused.

WALTON J. I agree with all that has been said by my brother Phillimore, but as the matter is of considerable importance, I desire to add a few words.

Sir George Smallman commenced the hearing of this investigation, which had already extended over a number of days when he was unhappily taken seriously ill and was unable to continue the

(1) (1888) 60 L. T. 538, at p. 540.
(2) (1817) 2 Stark. 208.
(3) 22 L. T. (N.S.) 786.
(4) 58 L. J. (M.C.) 42, at p. 43.

hearing. Strictly speaking, his illness rendered the hearing abortive, and the proceedings now before Sir Horatio Davies are really a rehearing on which counsel for the prosecution must call witnesses and tender evidence as if it was an original hearing. They may call all the witnesses called before Sir G. Smallman, or they may call some of them, as they may be advised. On the opening of the proceedings before Sir H. Davies the question arose as to how the evidence for the prosecution should be taken. Counsel for the Crown proposed to call some only of the witnesses called before Sir G. Smallman, to read over to these witnesses their depositions taken before him, to ask them whether the statements contained therein were correct, and then either to ask these witnesses further questions or submit them there and then for cross-examination. Objection was taken on behalf of the applicants to the course suggested, upon which Sir H. Davies intimated that as then advised he was prepared to allow counsel for the prosecution to take the evidence as they proposed. I think the application before us is in effect an application for a rule ordering the alderman to refuse to allow the evidence to be taken in this way on the ground that he is bound to refuse his assent to such a course. Is that contention well founded? No doubt when a number of witnesses are called, when their depositions are read to them, and each in turn is asked "Is that true?" the evidence so obtained is open to the comment that it is obtained in answer to a series of leading questions. Leading questions, as it appears from article 128 of Sir James Stephen's Digest of the Law of Evidence, if objected to by the opposite side, must not be asked in examination in chief or in re-examination, except with the permission of the Court. But is the alderman bound to refuse permission? We think not. If the objection is pressed he will have to consider whether he will permit the questions to be put; he will have to take all the circumstances of the case into account, including any unnecessary waste of time, for that is not of necessity to be disregarded. He must of course be careful to see that no injustice is done to the applicants; but we cannot say that he is bound to lay down as a matter of law that the evidence is to be taken in a particular way. It is a matter for his discretion to be exercised in the best

1909

BOTTOMLEY, *Ex parte.*

interests of justice, and it is not for this Court to interfere with his discretion.

Rules refused.

Solicitor for applicants: *A. Edward Dunn.*

W. H. G.

1909

Feb. 27; *March* 5

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* ETTRIDGE.

Criminal Law—Appeal—Sentence—Plea of Guilty—Sentence quashed—Sentence in substitution—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 3.

Where a prisoner pleads guilty at his trial the Court of Criminal Appeal has power to quash the sentence passed upon him and to substitute such other sentence, warranted in law, as they think ought to have been inflicted.

Rex v. *Davidson*, [1909] W. N. 52, overruled on this point.

APPEAL by the prisoner Ettridge against his sentence.

The prisoner was charged at the Middlesex Sessions upon two indictments—(1.) for breaking and entering a shop and stealing certain goods therein; (2.) for then committing malicious damage to two plate glass windows to the amount of 7*l.* He pleaded guilty to each indictment and was sentenced by the chairman to twenty-one months' imprisonment with hard labour on the first indictment and to three months' imprisonment with hard labour on the second, the sentences to be concurrent. He appealed against the sentence on the first indictment.

Since the prisoner's conviction a memorandum had been received from the chaplain of a military prison saying that the prisoner had made many honest efforts to obtain work, and that in his opinion he was not a criminal in the ordinary sense.

Warburton, for the prisoner. The sentence was too severe. In *Rex* v. *Davidson* (1) it was held that where a prisoner pleads

(1) [1909] W. N. 52.

1909

REX v. ETTRIDGE.

guilty at the trial the Court of Criminal Appeal has no power, after having quashed his sentence, to pass another sentence in substitution for it; but in *Rex* v. *Nuttall* (1) the contrary view was adopted.

Bodkin, for the prosecution. It must be admitted that the sentence was too severe. The chaplain's memorandum was not before the chairman of Middlesex Sessions. The Court of Criminal Appeal has power to alter the sentence. The decision in *Rex* v. *Davidson* (2) was wrong. It is not binding upon the Court, as the point was not fully argued. Upon the true construction of s. 4, sub-s. 3 (3), of the Criminal Appeal Act, 1907, the Court of Criminal Appeal has power to alter any sentence passed on a prisoner within the legal limits of the sentence applicable to the particular crime of which the prisoner is convicted, whether upon a plea of guilty or by the verdict of a jury. Sect. 3, sub-s. (*c*), of the Act of 1907 gives a right of appeal by leave of this Court against any sentence passed upon a convicted prisoner, unless it is fixed by law. Sect. 4, sub-s. 3, is a mere machinery section and ought not to be construed so as to cut down the general right of appeal given by s. 3, sub-s. (*c*). A prisoner is convicted within the meaning of s. 3, sub-s. (*c*), whether he pleads guilty or is found guilty by the verdict of a jury, and therefore has the right of appeal against his sentence in both cases. The words "on an appeal against sentence" in s. 4, sub-s. 3, mean against a sentence passed under s. 3, sub-s. (*c*), on the prisoner's conviction. Those two sub-sections ought, if possible, to be read as being in harmony. If s. 4, sub-s. 3, only applies to the case of a prisoner who has been found guilty by a verdict, the effect will be that prisoners will be divided into two classes, and a person who has not shewn any contrition by pleading guilty will be entitled to

(1) (1908) 1 Cr. App. Rep. 180.

(2) [1909] W. N. 52.

(3) Criminal Appeal Act, 1907, s. 4, sub-s. 3: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

1909

REX v. ETTRIDGE.

receive the fullest consideration at the hands of this Court, while he who pleads guilty will not be entitled to be heard. That cannot have been the intention of the Legislature.

If the words " by the verdict " in s. 4, sub-s. 3, are repugnant to the intention of the statute, the Court may read the sub-section as if they were struck out. Without those words the Court would have the power to pass such other sentence warranted in law as it thought ought to be substituted.

The authorities which shew the power of the Court to modify the language of a statute where it is necessary in order to carry out its plain intention may be classed under three heads. (*a*) Words which have a perfectly plain meaning may be read not in their ordinary sense: *Rex* v. *Inhabitants of Everdon* (1); *Fowler* v. *Padget*. (2) (*b*) Words have been struck out: *Fisher* v. *Val de Travers Asphalte Co.* (3); *Reg.* v. *Inhabitants of East Ardsley* (4); *Salmon* v. *Duncombe* (5); *Rex* v. *Vasey* (6); *Hall* v. *Knox*. (7) (*c*) Words have been inserted in a statute in order to carry out its intention: *Reg.* v. *Buttle*. (8)

Further, the words " by the verdict " were only inserted in s. 4, sub-s. 3, by way of illustration. The fact that the sub-section mentions the particular instance where a verdict is found does not exclude the power of the Court to alter the sentence in the case where there is a plea of guilty.

[Sect. 19 of the Criminal Appeal Act, 1907, and r. 48 of the Criminal Appeal Rules, 1908, were also referred to.]

Cur. adv. vult.

March 5. The following judgment of the COURT (Darling, Walton, and Pickford JJ.) was read by

DARLING J. The appellant was charged at Middlesex Sessions before the chairman and other justices upon two indictments—(1.) that he did break and enter a shop and steal certain goods therein; (2.) that he did then commit malicious damage by breaking the windows of the shop. He pleaded guilty to each indictment

(1) (1807) 9 East, 101.
(2) (1798) 7 T. R. 509.
(3) (1875) 1 C. P. D. 259.
(4) (1850) 14 Q. B. 793.
(5) (1886) 11 App. Cas. 627.
(6) [1905] 2 K. B. 748.
(7) (1863) 4 B. & S. 515.
(8) (1870) 1 C. C. R. 248.

and was sentenced to twenty-one months' imprisonment with hard labour on the first indictment and to three months' imprisonment with hard labour on the second, the sentences to be concurrent. Against the sentence on the first indictment he now appeals. Assuming this Court to be of opinion that a different sentence should have been passed, we should quash the sentence, as is provided by the Criminal Appeal Act, 1907, s. 4, sub-s. 3. But there occurs the question whether we have power to pass another sentence in place of that one. Sect. 3 of the statute enacts that "a person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . . with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law." Here the appellant was convicted on his plea of guilty. He therefore has a right to appeal against the sentence passed upon him. Now, in order to see what this Court may do, we must turn to s. 4, sub-s. 3, of the statute, and it becomes plain that, should we think a different sentence should have been passed, we should "quash the sentence passed at the trial." Here the difficulty occurs; for the section proceeds "and pass such other sentence warranted in law by the verdict . . . . in substitution therefor as they think ought to have been passed." Had the sentence now in question followed on a verdict there would here be no difficulty. But it was pronounced after no verdict and in consequence of the plea of guilty. On behalf of the prosecution it is contended that the words "by the verdict" may be rejected by us and the statute read as though they were not there. For the appellant it is argued that this Court has already, and as at present constituted, held that we have no power in these circumstances to substitute another sentence for one quashed. We did so decide in *Rex* v. *Davidson*. (1) The point, however, was not argued on both sides, and we propose now to consider the question without reference to the opinion we formerly expressed.

Where no meaning can be given to certain words of a statute without rejecting some of those used in it, or where the statute would become a nullity were all the words retained, the Court has power to read a section as though the words which

(1) [1909] W. N. 52.

1909

REX v. ETTRIDGE.

make it meaningless or nullify it were not there; for this it is enough to cite *Fisher* v. *Val de Travers Asphalte Co.*(1) and *Lloyd* v. *Lloyd*. (2) This, however, does not nearly solve our present question; for the section, even were the words "by the verdict" retained, is not meaningless, nor is the section a nullity, for it would be operative in all cases in which the conviction is the effect of a verdict of the jury. We are distinctly of opinion that Parliament could hardly have intended that only those who should have been found guilty by a jury should be allowed to appeal against the sentence, which is not the act of the jury at all, but is fixed and awarded by the judge, whether the conviction follow on a plea of guilty or on a plea of not guilty and a verdict of guilty. We are of opinion that we may in reading this statute reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the Legislature; and this is to be ascertained from a careful consideration of the entire statute. For this opinion many cases might be cited, but it is sufficient to refer to *Reg.* v. *Inhabitants of East Ardsley* (3), *Reg.* v. *Buttle* (4), *Rex* v. *Vasey* (5), and especially *Hall* v. *Knox* (6) and *Salmon* v. *Duncombe*. (7) In some of the cases cited to us, and notably in this last, the Court has attributed to the draftsman some defect of expression. But, strictly speaking, should ambiguity or contradiction in terms be manifest, it is unnecessary to determine whether this be due to bad drafting, to the hurried acceptance of amending words, or to the operation of rules resulting in the passing en bloc of some clauses of a Bill with no opportunity for either discussion or amendment.

From a careful consideration of the whole of this statute we are satisfied that it was intended, as is plainly shewn in s. 3, to give to those who might plead guilty an appeal against the sentence passed on their conviction. It appears to us unreasonable to place the Court of Criminal Appeal in the position of having either to leave the sentence untouched or to release the

(1) 1 C. P. D. 259.
(2) (1885) 14 Q. B. D. 725.
(3) 14 Q. B. 793.
(4) 1 C. C. R. 248.
(5) [1905] 2 K. B. 748.
(6) 4 B. & S. 515.
(7) 11 App. Cas. 627.

1909

REX v. ETTRIDGE.

guilty person unpunished. No reason for making such a difference between the treatment of a man convicted on his own confession and that of one convicted by a jury has been suggested to us, nor can we imagine one. If such difference were intended, it is nowhere affirmatively expressed, but is merely to be inferred from the presence in s. 4, sub-s. 3, of the words "by the verdict." Why those words are there we may guess unprofitably but cannot certainly say. They are not necessary to enable the Court to pass a substituted sentence for one quashed where the appellant has been found guilty by a jury, and we cannot believe that they were deliberately inserted for the express purpose of disabling the Court or limiting its power on the consideration of an appeal against sentence by one who has pleaded guilty. Yet, were we to hold that these words "warranted in law by the verdict" do apply to a case in which sentence has followed on a plea of guilty, we could give them no other effect. Where there has been a verdict these words are plainly superfluous. Where (as in this case) there has been no verdict they cannot be read in any way which would not defeat what was plainly the intention of the Legislature. In these circumstances we are of opinion that the rules to be collected from the cases decided on the interpretation of statutes justify us in disregarding those words and in holding that this statute gives us power to quash the sentence appealed from, and to pass in its place another sentence warranted by law.

As to the sentence; having regard to the circumstances which have transpired since the conviction, we think that it should be reduced from twenty-one months' to twelve months' imprisonment with hard labour, to date from the conviction.

Appeal allowed.

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *The Director of Public Prosecutions.*

J. E. A.

1909
March 4.

PORTER *v.* LONDON AND MANCHESTER INSURANCE COMPANY.

County Court—Practice—Appeal to Judge from Registrar—Interlocutory Application—Order—County Court Rules, 1903 *and* 1904, *Order* XII., *rr.* 9, 11.

By s. 74 of the County Courts Act, 1888, an action may by leave of the judge or registrar be commenced in the Court in the district of which the cause of action wholly or in part arose.

By Order XII., r. 9, of the County Court Rules, when the plaintiff has obtained leave so to commence an action in a Court distant more than twenty miles from the defendant's residence or place of business, the defendant may, within a certain time, forward by registered post letter to the registrar of the Court in which the plaint is issued an affidavit disclosing a good defence upon the merits to the action; and the registrar, if satisfied that the affidavit discloses such a defence, is directed forthwith by notice in the prescribed form to call upon the plaintiff to deposit in Court within a certain time such a sum as the registrar may, having reference to all the circumstances of the case, direct. Where the deposit is not duly made the action is to be struck out.

By Order XII., r. 11 (8.), of the County Court Rules, where any interlocutory application may be made to the registrar, and is so made, the judge may vary or rescind any order made by the registrar, and may make such order as may be just:—

Held, that the act of a registrar under Order XII., r. 9, in calling upon a plaintiff by notice to deposit a sum in Court is not an order within the meaning of Order XII., r. 11 (8.), and that the judge of the county court has no power to vary or rescind it.

APPEAL from the judge of the county court of Lancashire holden at Chorley on his refusal to vary or rescind an order of the registrar of that Court.

The plaintiff had obtained leave under s. 74 of the County Courts Act, 1888 (1), and under Order v., r. 13 (1.), of the County

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six calendar months next before the time of commencement, or, with the like

Court Rules, to bring an action in the Chorley County Court upon an affidavit alleging causes of action for wrongful dismissal and for money paid by him at the request of the defendants, and stating that those causes of action had in part arisen in the district of that Court. The defendants resided and carried on

---

leave in the Court in the district of which the cause of action or claim wholly or in part arose."

County Court Rules, 1903 and 1904, Order v., r. 13: "(1.) Where leave to enter a plaint under s. 74 of the Act is required, an application shall be made upon the affidavit of the proposed plaintiff or of some person on his behalf who has knowledge of the facts, setting forth the facts on which the application is grounded, according to such one of the forms in the appendix as shall be applicable to the case. . . . .

"(5.) The affidavit shall be lodged with the registrar, together with a copy of the same for each defendant.

"(6.) The judge or registrar shall duly consider the facts disclosed by the affidavit, and shall exercise his discretion in each case as to the grant or refusal of leave in accordance with the circumstances."

Order XII., r. 9: "Where the residence or place of business of a defendant is more than twenty miles distant from the Court in which the plaint is entered, he may, not later than five clear days at least before the return day of the summons thereon, forward by registered post letter to the registrar of such Court an affidavit disclosing a good defence upon the merits to the action. The registrar upon receipt of such affidavit, if satisfied that it discloses such a defence shall forthwith by notice, according to the form in the appendix, call upon the plaintiff to deposit in Court, within two clear days of the date of the notice, such a sum as the registrar may, having reference to all the circumstances of the case, direct. The registrar shall, where the deposit is made or not made, or the affidavit does not disclose a defence, send notice to the defendant according to such one of the forms in the appendix as shall be applicable to the case; and where the deposit is not duly made the action shall be struck out."

Rule 11: "Where by any statute or by these rules any interlocutory application is expressly or by reasonable intendment directed to be made to the Court, or to the judge, or to the judge or registrar, or to the registrar, then, subject to the provisions of the particular statute or of the particular rule applicable thereto, and so far as the same shall not be inconsistent therewith, the following provisions shall apply:— . . . .

"When the application may, under the particular statute or rule, be made to the registrar, and is so made, the following additional provisions shall apply:—

"(7.) The registrar may, if in doubt as to the proper order to be made, refer the matter to the judge forthwith or at the next Court day or at the trial.

"(8.) The judge may vary or rescind any order made by the registrar, and may make such order as may be just, and if necessary adjourn the trial."

1909

PORTER v. LONDON AND MANCHESTER INSURANCE COMPANY.

their business in London. Acting under Order XII., r. 9 (1.), of the County Court Rules, they forwarded by registered post letter to the registrar of the Chorley Court an affidavit disclosing a good defence to the action upon the merits. The registrar of the Chorley Court, being satisfied that the affidavit disclosed a good defence, sent a notice to the plaintiff, according to form 90 in Appendix H to the County Court Rules, requiring him within two days from the date thereof to deposit in Court the sum of 20*l.* to abide the event of the action, and notifying that in default of his making such deposit as directed the action would be struck out.

The plaintiff appealed to the county court judge to review or vary this order and to make such order as might be just. The judge held that the procedure under Order XII., r. 9, was confided to the discretion of the registrar, and that the notice sent by the latter to the plaintiff under its provisions, requiring the plaintiff to pay the sum of 20*l.* into Court, not being made on any application, was not an order within the meaning of Order XII., r. 11 (8.), of the County Court Rules, and that consequently he had no jurisdiction to vary or rescind it.

The plaintiff appealed.

The question was whether the act of the registrar in sending the notice under Order XII., r. 9, was an order within the meaning of Order XII., r. 11 (8.), of the County Court Rules.

Compton Smith, for the appellant.

E. E. Wild, for the respondents.

The arguments of counsel sufficiently appear from the judgments.

DARLING J. In my opinion the county court judge was right, and this appeal must be dismissed. The question arises on the terms of Order XII., r. 9, and Order XII., r. 11, of the County Court Rules. It is provided by Order XII., r. 9, that where a person sues in a Court where it is not obvious that he has the absolute right to sue, the registrar of that Court may put him under certain terms. The defendant, where his residence or place of business is more than twenty miles from the Court in

which the plaint is entered, may forward to the registrar an affidavit disclosing a good defence upon the merits to the action. The registrar considers that affidavit; if he is satisfied that it discloses a good defence on the merits he may put the plaintiff under terms. In this case the terms were the payment of 20*l.* into Court. If the money is not paid into Court the action may be struck out. At first that appears to be a very arbitrary provision, but when one considers that the action is only struck out in that particular Court, and that the plaintiff may proceed to issue a plaint in the Court of the district where the defendant resides or carries on business, in which case he will not be called upon to give any security, then the order seems a very reasonable one. Order XII., r. 9, contains no provision for an appeal from the action of the registrar in such a case. Order XII., r. 11, provides for appeals in the case of interlocutory applications and is said to apply in the present case. The words relied on are these: "When the application may, under the particular statute or rule, be made to the registrar, and is so made, the following additional provisions shall apply . . . . (8.) The judge may vary or rescind any order made by the registrar, and may make such order as may be just, ..."

I do not think that this provision is intended to apply to the acts of the registrar under Order XII., r. 9. No "application" is made to him within the meaning of the words which I have read. There is merely the sending of an affidavit by registered letter, followed by a notice from the registrar to the plaintiff requiring him to pay a sum of money into Court, the extreme result of which as against the defendant is that the plaintiff may sue in that Court. It is not expedient that appeals with all their attendant expenses should lie from these so-called orders. It is to be remembered that this is the case of a plaintiff bringing for his own convenience an action in a Court which is not the most obvious Court for him to proceed in. If he chooses to do that, it is fair enough that he should be put under conditions, and the registrar has an absolute discretion as to what those conditions shall be.

Moreover, the county court judge heard this question on the merits, and it is plain that, if he had thought he had jurisdiction

1909

PORTER v. LONDON AND MANCHESTER INSURANCE COMPANY.

Darling J.

to review the act of the registrar, he would have come to the same conclusion on the ground that the affidavit of the defendant disclosed a sufficient answer. From what I see of the claim and defence I am clearly of opinion that the order of the registrar was a very reasonable and proper one, especially when the result of not complying with it is merely that the plaintiff cannot sue in the Court which is most convenient to himself, but is not in any way precluded from suing in the Court of the defendants' district.

WALTON J. I am of the same opinion. In this case the plaintiff, residing in Chorley, was minded to sue the defendants in Chorley, though they reside and carry on their business in London. He could only do that by leave of the judge or registrar of the Chorley County Court under s. 74 of the County Courts Act, 1888, and Order v., r. 13, of the County Court Rules. He got leave under that section and rule from the judge or registrar on the ground that the cause of action in part arose in the Chorley district. According to the Act that leave is to be given by the judge or registrar. When leave is applied for, Order v., r. 13 (1.) and (6.), prescribes what is to be done by the judge or registrar. The application for leave is to be made on the affidavit of the proposed plaintiff setting forth the facts on which it is grounded. The judge or registrar is to consider the facts disclosed by the affidavit and to exercise his discretion as to granting or refusing leave according to the circumstances in each case. Those proceedings are entirely ex parte. There are no provisions giving an opportunity to the defendant to be heard, and it is not self-evident whether any appeal would lie from the leave so given. The course to be taken by a defendant who objects to being sued in a Court of the plaintiff's choosing is that prescribed by Order XII., r. 9, which provides that the defendant may send to the registrar an affidavit, and if the affidavit discloses a good defence, then Order XII., r. 9, enables the registrar to direct what sum shall be paid into Court by the plaintiff, so that the leave given to the plaintiff may, when the defendant has had an opportunity of sending in his answer, become a conditional leave.

These are, no doubt, in a sense interlocutory proceedings, but the granting of leave to the plaintiff, the consideration of the affidavit of the defendant, and the decision on the sufficiency of the defence set up therein and the amount to be deposited in Court, these are so many acts of the registrar's discretion, and are not orders within the meaning of Order XII., r. 11 (8.). In these cases I do not think it was intended that there should be any appeal at all; they are merely part of the machinery to be applied in case the plaintiff wishes to sue the defendant in the plaintiff's Court. If he does not comply with the directions, the only result is that his action cannot proceed in that Court, but that he must sue in the defendant's Court. For these reasons I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Rawlings & Butt, for J. H. Neville, Chorley.*

Solicitors for respondents: *Coode, Kingdon & Cotton, for J. C. Milton, Chorley.*

W. H. G.

1909
Feb. 4.

CHISLETT *v.* MACBETH & CO.

Negligence—Master and Servant—Ship—"Seaman"—Workman—Hand assisting to move Ship from one Part of Dock to another—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 2—*Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 13—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 742.

The plaintiff was engaged with other men in warping a vessel owned by the defendants, by whom he was employed, from one berth to another across a large dock connected with a tidal river. He was not a member of the crew of the vessel. During the operation he sustained personal injuries, the duty in which he was engaged at the time he was injured consisting of unmooring the vessel from the side of the dock where she was then lying and passing ropes to a tug and to the quay alongside which she was to be moored. The vessel was taken across by means of the tug and a rope, and was during this operation at no moment entirely free from a quay. She was not using her own steam nor any motive power of her own.

In an action brought by the plaintiff under the Employers' Liability Act, 1880, against the defendants, his employers, for damages for the personal injuries sustained by him whilst in their employment:—

Held, that he was a "seaman" and was consequently excluded from the operation of the Employers' Liability Act, 1880.

Corbett v. *Pearce*, [1904] 2 K. B. 422, followed.

Appeal by the defendants from the judgment of the judge of the Liverpool County Court.

The question was whether the plaintiff, who was employed as a "rigger" on board a steamship in dock, was a "seaman" so as to be excluded from the benefits of the Employers' Liability Act, 1880 (1), under which he brought an action against the

(1) Employers' Liability Act, 1880, s. 8: "For the purpose of this Act, unless the context otherwise requires,—

The expression 'workman' means . . . . any person to whom the Employers and Workmen Act, 1875, applies."

Employers and Workmen Act, 1875, s. 13: "This Act shall not apply to seamen or to apprentices to the sea service."

Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11: "The thirteenth section of the Employers and Workmen Act, 1875, shall be repealed in so far as it operates to exclude seamen and apprentices to the sea service from the said Act, and the said Act shall apply to seamen and apprentices to the sea service accordingly; but such repeal shall not, in the absence of any enactment to the

defendants, his employers, for damages for personal injuries sustained by him whilst in their employment.

The plaintiff was engaged in warping the vessel, which was owned by the defendants, from one berth to another across the Langton Dock, which is one of the large docks in Liverpool and is connected with a tidal river. He was one of five hands who were so engaged upon the deck of the vessel. The duty in which he was engaged at the time he was injured consisted of unmooring the vessel from the side of the dock where she was then lying, and passing ropes to a tug and to the quay alongside which the vessel was to be moored. The vessel was taken across by means of the tug and a rope and was during this operation at no moment entirely free from a quay. She was not using her own steam nor any motive power of her own. The plaintiff was not a member of her crew.

The county court judge held that the plaintiff was not a "seaman" and was therefore not excluded from the operation of the Employers' Liability Act, 1880, upon the ground that the definition contained in s. 2 of the Merchant Shipping Act, 1854, does not apply to casual and temporary employment in work of the character of that in which the plaintiff was engaged, at a time when the vessel was not moved in a self-navigating manner, but was being dragged by external power over artificial water. The county court judge entered judgment for the plaintiff for 50*l*.

The defendants appealed.

Maxwell, for the defendants. The plaintiff was a "seaman" within the meaning of s. 2 of the Merchant Shipping Act, 1854, and s. 13 of the Employers and Workmen Act, 1875, and the effect of s. 8 of the Employers' Liability Act, 1880, is to exclude

---

contrary, extend to or affect any provision contained in any other Act of Parliament passed, or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies."

Merchant Shipping Act, 1854, s. 2 (repealed and re-enacted by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 742): "'Seaman' shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

1909

CHISLETT v. MACBETH & Co.

him from any right to compensation under that Act: *Corbett* v. *Pearce*. (1) He was employed in doing ship's work. He would not have been employed if there had been a crew. He comes within the test as to whether a person is a seaman laid down in *The Ruby*. (2) He and his companions were on the vessel and working her from one place to another. His duties were quite different from those of any one employed in the stowage of the cargo, who need not be a seaman in any sense: *The Jane and Matilda* (3); *Thomson* v. *Hart* (4); *Reg.* v. *City of London Court*. (5)

Hanbury Aggs, for the plaintiff. A person has never been held to be a seaman where he has not been a member of the crew nor engaged for a specific voyage. The term "seaman" does not apply to a person whose employment is merely casual and temporary. The ship was never actually detached from a quay. She was always attached by ropes. In *Corbett* v. *Pearce* (1) the man who was held to be a seaman was a member of the crew, and it was not necessary to decide that the meaning of the word "seaman" in s. 2 of the Merchant Shipping Act, 1854, is the same as the meaning it bears in the Employers and Workmen Act, 1875. The vessel had at the time no power of self-propulsion nor of navigation without external aid, and she was therefore not a ship within the meaning of the Merchant Shipping Act, 1854: *Raine* v. *Jobson & Co.* (6) The Employers' Liability Act, 1880, was passed for the benefit of workmen and therefore ought to be construed liberally. In *Kellard* v. *Rooke* (7) the plaintiff was employed in the stowage of cargo, but the point that he was a seaman appears not to have been taken. *The Jane and Matilda* (3) is distinguishable. There the cook was a member of the crew and the question was whether, being a female, she could recover the value of her services. [*In re Great Eastern Steamship Co.* (8) and *Southport Corporation* v. *Morriss* (9) were also referred to.]

(1) [1904] 2 K. B. 422.
(2) [1898] P. 59.
(3) (1823) 1 Hagg. Adm. 187.
(4) (1890) 28 Sc. L. R. 28.
(5) (1890) 25 Q. B. D. 339.
(6) [1901] A. C. 404.
(7) (1888) 21 Q. B. D. 367.
(8) (1885) 5 Asp. M. C. 511.
(9) [1893] 1 Q. B. 359.

1909

CHISLETT v. MACBETH & Co.

Bigham J.

BIGHAM J. In this case the plaintiff was engaged in warping a vessel owned by the defendants, by whom he was employed, from one berth to another across the Langton Dock, which is one of the large docks in Liverpool. He was one of five hands who were so engaged upon the deck of the vessel in question. The duty in which he was engaged at the moment consisted of unmooring the vessel from the side of the dock where she was then lying, and passing ropes to a tug and to the quay alongside of which the vessel was to be moored. Then we are told that the vessel was taken across by means of the tug and a rope, and was during this operation at no moment entirely free from a quay. She was not using her own steam or any motive power of her own. The only question we have to consider is whether whilst so employed he was a seaman so as to exclude him from the benefit of the provisions of the Employers' Liability Act, 1880, under which he is suing. In my opinion *Corbett* v. *Pearce* (1) is a distinct authority for the proposition that in interpreting the Employers' Liability Act, 1880, the definition of the meaning of the word "seaman" must be sought for in the Merchant Shipping Act, 1854. That Act defines the word "seaman" as including "every person . . . . employed or engaged in any capacity on board any ship." These words are very wide indeed, and I am not going to say that they would apply to every conceivable case of a man who was actually on the deck of a ship and was actually employed while there. There may probably be some limitations. But I am unable to say that this man was not "employed or engaged in any capacity on board any ship." He was employed as a rigger to move the ship, which was going from one side of the dock to the other, and to regulate her movements. That being so, I am unable to follow the judgment of the county court judge, although I am loth to differ from him. He came to the conclusion that "the definition does not apply to casual and temporary employment of this character." I cannot accede to that statement. The plaintiff was engaged on board a ship in a matter connected with the ship. She was in motion at the time, though not by means of her own steam power, and she was being transferred from one

(1) [1904] 2 K. B. 422.

1909

CHISLETT v. MACBETH & Co.

Bigham J.

place to another on the surface of the water. Although the plaintiff's employment may be said to be casual and temporary, it seems to me that he is within the definition of a seaman in s. 2 of the Merchant Shipping Act, 1854. The county court judge gives as an additional reason for holding that the plaintiff was not a seaman that the vessel was not employed in a self-navigating manner, but was being dragged by external power over artificial water. If the first part of this proposition is accurate, it would exclude all vessels towed by tugs if they were not using their own power, and persons employed upon board would not come within the meaning of the definition. I do not think that it is material that this was in a sense an artificial piece of water. It is a piece of water in connection with a tidal river. It is a large sheet of water and it has to be navigated, that is to say, vessels have to be taken from one point to another. I am of opinion that the county court judge has not properly applied the definition to the facts and that the plaintiff comes within its terms. For these reasons the appeal must be allowed and judgment entered for the defendants.

WALTON J. I am of the same opinion. The action is brought by the plaintiff to recover damages under the Employers' Liability Act, 1880, for injuries received by him. The reason the action was brought under the Act of 1880 probably was that it was desired to avoid the consequences of the doctrine of common employment. Naturally one does not desire to exclude any man who performs work from the benefit of the statute, but I feel bound by the decision in *Corbett* v. *Pearce* (1), and in my judgment the plaintiff was a seaman within the meaning of the Employers' Liability Act, 1880, as interpreted by that authority, and is therefore excluded from the benefit of that statute.

Appeal allowed.

Solicitor for plaintiff: *Edward Lloyd, Liverpool.*

Solicitors for defendants: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool.*

(1) [1904] 2 K. B. 422.

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 23.

BENDER *v.* OWNERS OF STEAMSHIP ZENT.

Employer and Workman—Compensation—Accident arising out of and in course of Employment—Evidence—Inference—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

It is competent for the Court to draw an inference from the facts proved that the accident causing injury or death did happen "in the course of" and arose "out of" the employment, although no person was present who could give direct evidence how and when the accident happened, but the onus of proof is on the applicant in every case, and none the less so because by the death of the workman a greater burden is placed on the dependants of the deceased.

While a steamship was on the high seas, the chief cook and baker was lost overboard; the weather was fine at the time, the ship was steady, and there was a four-foot rail and bulwark all round. The deceased was last seen at 5.35 A.M. going aft. His widow applied for compensation under the Workmen's Compensation Act, 1906:—

Held, that there was no evidence which would enable the Court to draw the necessary inference that the accident causing death arose "out of" as well as "in the course of" the employment.

APPEAL against an award of the judge of the county court of Liverpool upon a claim for compensation under the Workmen's Compensation Act, 1906.

The applicant was the widow of Adolph Bender, chief cook and baker on the steamship *Zent*, belonging to the respondents. On May 17, 1908, while the steamship was in mid ocean on a voyage from Manchester to Costa Rica, Bender was lost overboard; the matter was reported to the Consul at Costa Rica on the ship's arrival, and the usual Board of Trade inquiry as to the man's death was held, and the present application was tried on the depositions of the master and some of the crew that were made for the purpose of the Board of Trade inquiry.

The facts were as follows:

Bender was seen by a carpenter at 5.25 A.M. standing in the port alleyway, looking over the side; 5.30 A.M. was his usual time for turning out, and he was last seen at 5.35 A.M. going aft. The deceased was in the habit of using the engineers' water closets, which

C. A. 1909

BENDER v. OWNERS OF STEAMSHIP ZENT.

were situated aft. The sea was smooth at the time, the weather fine, and the ship perfectly steady. There was a four-foot rail and bulwark all round the vessel, and it was stated to be impossible for a man to have fallen overboard. At 6.20, when Bender was wanted by the chief steward to go with him and draw stores, his absence was first discovered. Bender was a quiet, well-behaved man and on good terms with the rest of the crew.

In September, 1908, the applicant commenced proceedings under the Workmen's Compensation Act, 1906, claiming compensation from the owners of the vessel for the loss of her husband.

The county court judge found that the deceased met with his death on the high seas while on board the *Zent* by an accident arising out of and in the course of his employment, and made an award in favour of the applicant.

The employers appealed.

Horridge, K.C., and *H. Maxwell*, for the appellants. There must be some facts or circumstances from which an inference can be drawn that the man met with his death from an accident arising "out of and in the course of" his employment; the Court cannot be required to presume that the man was doing his duty until the contrary is proved: *McDonald* v. *Owners of Steamship Banana*. (1) None of the deceased man's duties were likely to lead him into any danger, as in *Grant* v. *Glasgow and South Western Ry. Co.* (2) The onus of proof that the accident did arise "out of" the employment is on the person claiming compensation.

Rigby Swift, for the applicant. In *Moore* v. *Manchester Liners, Ld.* (3) it was laid down that all the crew engaged for the round trip are under the orders of the captain all the time, and if this man met his death while carrying out any orders, that would be an accident arising "out of" his employment.

There was some evidence from which an inference could be drawn; the main difficulty is caused by the man's disappearance. Had the body been found in the hold or down a hatchway, the

(1) [1908] 2 K. B. 926. (2) (1907) 45 Sc. L. R. 128.
(3) [1909] 1 K. B. 417.

case would have been within *McNicholas* v. *Dawson & Son* (1), where no explanation was given how the deceased met with his death, and this kind of case is anticipated by Kennedy L.J. in *McDonald* v. *Owners of Steamship Banana.* (2)

It seems from *Mitchell* v. *Glamorgan Coal Co.* (3) and *Grant* v. *Glasgow and South Western Ry. Co.* (4) that the onus of proof is sometimes shifted on to the employers. In the present case it is for them to shew that this man was not engaged in his ordinary duties when the accident happened; and on this ground the county court judge was entitled to draw the inference he did.

COZENS-HARDY M.R. This is a case which may be said to be near the line, but it seems to me to be one in which we are bound to uphold the proposition which has been repeatedly laid down in this Court, that it is for the applicant to prove that the accident arose out of and in the course of the employment, and that that rule applies none the less although, by reason of the death of the workman, it may be that a greater burden is thrown on the dependants of the deceased. That being the general principle of law, it is equally true that the Court may find that the accident arose out of as well as in the course of the employment, although no human being was present who could give direct evidence how and when the accident happened. In other words, it is competent to the Court to draw an inference from facts which are proved, and to draw the inference that the accident did happen in the course of and arose out of the employment, and the only question here is whether there is anything which justified the learned county court judge in drawing the inference which he did. [His Lordship then stated the facts, and continued:—] Nobody knows how the accident happened. We know within a little the time at which it happened, but, notwithstanding all the inquiries that were made and all the searches that were made, we get no further. Under those circumstances, is there any justification for inferring that the death, which I assume arose "in the course of" the employment, arose "out of" the employment? I am bound to say I think there is no ground. There are many

(1) [1899] 1 Q. B. 773, 778.
(2) [1908] 2 K. B. 926, at p. 932.
(3) (1907) 23 Times L. R. 588.
(4) 45 Sc. L. R. 128.

C. A. 1909

BENDER v. OWNERS OF STEAMSHIP ZENT.

Cozens-Hardy M.R.

contingencies, any one of which is almost as probable as the other. Although he was chief cook and baker, it is conceivable that he might have been engaged on some ship's work, or something incident to the employment on deck, at that early hour. It is conceivable that he may have been out there amusing himself or, to use the word which has been frequently used, larking. It is conceivable that he may have been guilty of suicide. Under those circumstances it seems to me that there is nothing whatever in the circumstances of this case which justified the county court judge in inferring that which he did infer. I do not think that in arriving at this conclusion we are in the least departing from *Mitchell* v. *Glamorgan Coal Co.* (1), to which I was a party, nor do I think I am saying anything in the least inconsistent with *Grant* v. *Glasgow and South Western Ry. Co.* (2) That was the case of a policeman whose duty took him to all parts of the station premises to guard against theft and pursue trespassers, and various other things. Finding, as the Court did, that he was on his way to take money to the bank and was crossing the siding when the accident happened, the inference, I think, there was irresistible that the accident arose not only "in the course of" his employment, but "out of" it.

For all these reasons, although we cannot help pitying the dependants who are the respondents here, I think the learned judge came to a wrong conclusion and that this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion.

I have no doubt that this accident arose "in the course of" this man's employment. Speaking for myself, I should not in the case of a seaman lost at sea be very tardy in a proper case to draw the inference that it arose also "out of" his employment, but the circumstances in this case appear to me not to give sufficient ground for such an inference. If one of the watch on a stormy night was found to be missing, I should have very little difficulty in drawing the inference that the probable cause of the accident was the increased danger to which the seaman was subjected by having to do the duty of

(1) 23 Times L. R. 588. (2) 45 Sc. L. R. 128.

a seaman on watch in such perilous circumstances. But, in the present case, the weather was fine; it was daylight, and there is no suggestion that any portion of this man's duties would lead him into a position of danger at all. All we know is that he was missing. There may be many ways in which he might have come to his death which would arise from things that did not come out of his employment. Under those circumstances, as the law has put the onus on the plaintiff in this matter, we are obliged to say that she has not supported that onus and that this appeal must be allowed.

FARWELL L.J. I agree. The onus of proving his case is as much on the executors of a deceased workman as on a living one who has been injured. In this case it appears from the evidence the last that was seen of the deceased was this: "I saw the chief cook standing in the port alleyway, looking over the side." After that nothing is known of him. On those facts I cannot see on what possible ground we can come to the conclusion that the accident arose "out of" the employment, although it may very well have been "in the course" of his employment. I am not at all disposed to differ from the dictum of Fletcher Moulton L.J. in *Moore* v. *Manchester Liners, Ld.* (1), referred to by counsel for the respondents, but the Act requires the plaintiff to prove also that the accident arose "out of" the employment; I fail to see how one can possibly say that the onus has been discharged, when the only evidence is that the last that was seen of the cook was that he was looking over the side. That is consistent with a number of things, but, so far as I can see, it is difficult to find anything arising "out of" the employment with which it is consistent. I do not myself suggest suicide, because, suicide being a crime, the presumption is against it. In my opinion this appeal must be allowed.

Appeal allowed.

Solicitors: *Weightman, Pedder & Co., Liverpool*; *Bremner, Sons & Corlett, Liverpool.*

(1) [1909] 1 K. B. 417.

W. C. D.

C. A.
1909
March 26.

[IN THE COURT OF APPEAL.]

MARSHALL *v.* OWNERS OF STEAMSHIP WILD ROSE.

Employer and Workman—Compensation—Accident arising out of and in course of Employment—Seaman—Unexplained Drowning—Evidence—Presumption—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The unexplained drowning of a seaman engaged on board ship does not of itself raise any presumption that his death was the result of an accident arising out of as well as in the course of his employment so as to entitle his dependants to compensation under the Workmen's Compensation Act, 1906.

APPEAL from an award of the county court judge of Newcastle-upon-Tyne under the Workmen's Compensation Act, 1906.

The application for compensation was made by the widow of one Marshall, who at the time of his death was second engineer on the steam trawler *Wild Rose*, belonging to the respondents. On May 27, 1908, the vessel put into Aberdeen. The deceased and the first engineer went on shore in the evening and returned on board shortly after 10 P.M. Steam was to be got up by midnight. The deceased went below and took off his clothes, except his trousers, shirt, and socks. It was a very hot night. He subsequently came out of his berth and went on deck, and, as he passed the first engineer, said that he was going on deck for a breath of fresh air. The men usually sat on the starboard quarter against the fish board. He was missed by the first engineer at midnight, and next morning his body was searched for and was found just under the place where the men usually sat.

The county court judge was of opinion that he was entitled to draw the inference from these facts that the deceased met his death from an accident arising out of and in the course of his employment, and made an award in favour of the applicant.

The employers appealed.

Atkin, K.C., and *Mundahl*, for the appellants. This case is indistinguishable from *Bender* v. *Owners of Steamship Zent.* (1)

[They were stopped.]

(1) Ante, p. 41.

Lowenthal (*Scott Fox, K.C.*, with him), for the respondent. *Bender* v. *Owners of Steamship Zent* (1) is distinguishable. In this case it is known that the man went on deck to cool himself, and that he was bound to work at getting up steam very shortly. It is also known that it was a very hot night, and it is a fair inference to draw from the evidence that he went on deck in order to put himself in a fit condition for performing that duty. It is also known that the men were accustomed to sit on the rail by the fish board, and having regard to the fact that the body was found exactly under that spot the Court may properly infer that the deceased fell from the rail. Unless these inferences can be drawn, compensation will not be available in cases where it is most wanted.

COZENS-HARDY M.R. I cannot help feeling a good deal of sympathy with the applicant in a case like this; but we must administer this Act according to what we believe to be its fair meaning and having regard to the decisions which have been arrived at by this Court in similar cases. The facts in this case are very meagre. The deceased was the second engineer on a ship which had arrived at Aberdeen. He and the first engineer went ashore in the evening. They returned later in the evening, according to the evidence of the first engineer about 10. Steam had to be got up by midnight. The deceased went below and took off his coat and boots, and the first engineer says, "It was a very hot night. He subsequently came out of his berth, and as he passed me he said he thought he would go on deck for fresh air." That is all we know beyond this, that he was never seen again on that ship. The ship was in a tidal basin. His body was found by divers practically under or just at the side of the vessel. In these circumstances is there legitimate ground for drawing the inference that this accident arose not merely in the course of but out of his employment? I am bound to say, with some regret, I do not think there is. I will indicate in a moment a further point, but this Court has held in *McDonald* v. *Owners of Steamship Banana* (2), not I think for the first time, that

(1) Ante, p. 41. (2) [1908] 2 K. B. 926.

C. A. 1909

MARSHALL v. OWNERS OF STEAMSHIP WILD ROSE.

Cozens-Hardy M.R.

the mere fact that a sailor is in the immediate neighbourhood of his ship and is drowned is not a ground for saying that the accident arose out of as well as in the course of the employment. We applied that principle only a couple of days ago in *Bender* v. *Owners of Steamship Zent* (1), where a ship's cook on a perfectly calm day in mid Atlantic went on deck about 5 o'clock in the morning, it being then daylight, and was last seen looking over the rail. His absence from the ship was discovered half an hour later, and nothing more was known of him. We held that the burden had not been discharged by the applicant in that case. The facts were not sufficient to raise even a presumption that the accident arose out of the employment, though undoubtedly it arose in the course of the employment. What distinction can be possibly drawn between that case and this? Counsel for the applicant has said everything that could be urged for his client, but the only additional fact is this. The first engineer, who said that the deceased spoke to him as he was going on deck and told him he was going for fresh air, goes on to say, "We always sat on the starboard quarter against the fish board," and then he says that the body was found practically below the starboard quarter where the fish board was. We are asked to infer from that these two propositions: first, that the man went on deck not merely to take fresh air, as he was entitled to do, but in order to enable him to discharge better the duty to get up steam, which was then imminent; and, secondly, that it was in the performance of that duty that he sat on the starboard quarter, leaned against the board, and fell over backwards. With some regret I am unable to think that such an inference can be justified, and I am driven to hold in this case that there was no justification for the conclusion which the learned county court judge arrived at and that this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. I cannot differentiate this case from the case which we decided two days ago; but the point is a very important one, and I hope it will go to the highest tribunal, so that we may have directions upon it. It may be expressed in a very few words. Is the unexplained

(1) Ante, p. 41.

drowning of a sailor by falling from his ship when at sea a sufficient prima facie case for compensation? We have decided that it is not, because we think that the dependants have not discharged the onus which is upon them of shewing that the accident arose out of the employment. That it arose in the course of the employment there is no doubt. Seamen in their employment are necessarily on board continuously, by which I mean that not only when they are employed in active work about the ship, but also in the intervals between their active employment, they must be upon the ship. Therefore I have no doubt that the leisure of a sailor on board the vessel is as much in the course of his employment as the time which he spends in active work. The difficulty arises in deciding whether the accident arose out of his employment. Now it may be that a higher Court may say that because a seaman's employment puts him in a dangerous position, that is to say on board a ship surrounded by water as opposed to being on land, the mere fact that he is drowned while the ship is at sea is sufficient to raise a prima facie case for saying that his death by drowning arose out of his employment. We have come to the conclusion that this bare fact is not sufficient, and we must administer justice according to the best opinion we can form. I do not think that we ought to administer uncertain justice, and having once decided that point I think that we must adhere to our decision, and I ought to add that, apart from our previous decision, if the point came up again I should decide it in that way, because it represents upon the whole my view. I do not think that we are justified in drawing the inference we are asked to draw by the applicant.

I can quite understand that a higher Court may say that the facts to which I have referred justify the inference that the accident arose out of the employment, and I should be very glad personally to administer the law as so interpreted, because I feel that otherwise in the case of a large number of sailors whose death, if all the facts were known, would justify compensation being given to their dependants, the dependants will fail to get the relief intended by the Act simply because the circumstances of the death are unknown. But as matters stand at

BIBL. LONDIN UNIV.

C. A. 1909

MARSHALL v. OWNERS OF STEAMSHIP WILD ROSE.

present this appeal must be allowed because the facts here amount to nothing more than the unexplained drowning of the seaman.

FARWELL L.J. I am of the same opinion. We are bound by our own decision, and I cannot see any ground for distinguishing this case from the other case. Far be it from me to suggest any limitation to the powers of the House of Lords, but my own intelligence does not enable me to see how we can come to any other conclusion. It is perfectly plain from the decisions of the House of Lords as well as of this Court that the onus is on the claimant to make out his case. He has to prove affirmatively that he brings himself within the Act. The Act of Parliament has thought fit to add to "in the course of his employment" the words "arising out of the employment," shewing that both these two things are necessary. I cannot see myself how it is possible to infer from the mere fact that a man disappears in the course of his employment—that is in the course of the voyage on his ship, if he is employed as a sailor—without more, that he disappeared in consequence of an accident arising out of his employment.

Perhaps it is dangerous to give illustrations, but to illustrate my meaning I may add this: If an ordinary sailor is a member of the watch and is on duty during the night and disappears, the inference might fairly be drawn that he died from an accident arising out of his employment. But if, on the other hand, he was not a member of the watch, and was down below and came up on deck when he was not required for the purpose of any duty to be performed on deck and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any Court could draw the inference that he died from an accident arising out of his employment. I fail to understand why the Legislature in this Act has added the words "arising out of the employment," unless it intended those words to mean what they say. One can see that the burden on employers will be much greater if they are made to insure the men's lives against accidents however occurring. If it is intended so to increase their liability,

the Legislature ought to say so in plain terms. I think that this appeal must be allowed.

C. A. 1909

MARSHALL v. OWNERS OF STEAMSHIP WILD ROSE.

Appeal allowed.

Solicitors: *Williamson, Hill & Co., for R. & R. F. Kidd, North Shields; Maples, Teesdale & Co., for G. W. Chapman, North Shields.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1909 *March* 26.

SHIRT *v.* CALICO PRINTERS' ASSOCIATION, LIMITED.

Employer and Workman — Compensation — Accident — Surgical Operation — Cause of Death—Remoteness—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Where a workman is injured by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906, and death ensues from an operation consequent thereon, the test of the question whether death was caused by the accident so as to entitle his dependants to compensation is whether in the circumstances the operation was a reasonable step to be taken to obviate the consequences of the accident.

A workman met with an accident arising out of and in the course of his employment whereby his hand was badly lacerated. A competent surgeon proposed, instead of amputating the hand, by means of a double operation, to graft skin on it which would completely preserve the hand. An anæsthetic was properly administered at each stage of the operation, but on the second occasion death unexpectedly ensued.

Upon an application by the widow under the Workmen's Compensation Act, 1906, the county court judge found that death was caused not by the accident, but by the administration of the anæsthetic, and held that the employers were not liable:—

Held, that the county court judge had misdirected himself in not applying his mind to the question whether the deceased had acted reasonably, and that the widow was entitled to compensation.

APPEAL from an award of the county court judge of Ashton-under-Lyne sitting as arbitrator under the Workmen's Compensation Act, 1906.

On October 30, 1908, a workman employed at the respondents' calico printing works was cleaning a calendering machine,

C. A. 1909

SHIRT v. CALICO PRINTERS' ASSOCIATION, LIMITED.

when his hand was caught by the rollers and was badly lacerated. He was taken to the infirmary, and in the ordinary course it was stated that the hand would have been amputated, but, there being a slight connection to supply blood from the forearm, the surgeon of the infirmary proposed to perform the operation of grafting skin upon the hand, which would preserve the hand intact. The first stage of the operation, which consisted of preparing the hand for grafting, was performed under chloroform and was successful. The hand healed, except a granulated area on the outward edge; but in order to restore the hand completely and to prevent the fingers from becoming stiff it was necessary that the granulated area should be grafted with skin. On December 18 the workman was placed under chloroform with a view to the operation and died from the effects of the chloroform.

The widow applied for compensation under the Workmen's Compensation Act, 1906.

The medical evidence was to the effect that the second stage of the operation, though painful, was not dangerous, that the use of anæsthetics for it was reasonable, and that there was no ground for apprehending death.

The county court judge was of opinion that the operation was not a usual operation, but was a bold experiment, and he found that the cause of death was not the accident, but failure of breathing following upon the administration of chloroform, which was a novus actus interveniens; he therefore came to the conclusion that the employers were under no liability.

The applicant appealed.

Shakespeare, for the appellant. The judge misdirected himself in not applying his mind to the question whether the deceased acted reasonably in submitting to the operation.

[He was stopped.]

Gordon Hewart, for the respondents. The operation was not an ordinary one, but was a bold experiment, and if the workman chose to undergo it without consulting his employers he must be taken to have done so at his own risk. Death was caused not by the accident, but by the administration of chloroform.

C. A. 1909

SHIRT v. CALICO PRINTERS' ASSOCIATION, LIMITED.

COZENS-HARDY M.R. This appeal raises a curious and not unimportant point. A workman met with an accident, his hand being badly crushed between two rollers and the skin being taken off. It was admitted that the man, who was sent to the infirmary, was bound to undergo an operation of some kind. It is said that the usual course would have been to amputate the hand. That is an operation which would reasonably have involved the use of an anæsthetic, and if in that case the man had died by reason of the administration of the anæsthetic, counsel for the respondents admitted that he could not have contended that the employers would not have been liable. Instead of that, a skilful surgeon decided to perform an operation which would preserve the hand and make the man an able-bodied workman, instead of a maimed man for life, so as to relieve the employers from liability. An anæsthetic was administered in the first stage of the operation and no harm accrued. The operation was successful, but the result was that the hand would be of no use unless a further simple but painful operation was performed, namely, grafting some new skin on the hand. That was really a second step in the operation which the surgeon thought it necessary to perform. Unfortunately, in the course of administering the anæsthetic death ensued. There was no reason for apprehending death, but death did ensue. We are asked to say that the learned county court judge was right in holding that there was no liability on the part of the employers on the ground that this operation was a bold experiment and that in the circumstances the administration of the anæsthetic constituted a novus actus interveniens. With great respect to the learned judge, he seems to have misdirected himself. The true test was whether the step taken to obviate the consequences of the accident and to make the man a sound, able-bodied man was a reasonable step to take. As to that the evidence is all one way. The learned judge has not applied his mind to that point. He says that the operation was a bold one, and, although the first step in it was successful as far as it went, he seems to have thought that there was some inherent vice in the operation because the second step involved the administration of an anæsthetic which caused death and

C. A. 1909

SHIRT v. CALICO PRINTERS' ASSOCIATION, LIMITED.

Cozens-Hardy M.R.

therefore the operation proved futile. In my opinion the course pursued by the workman was not only courageous but reasonable in the interest of the employers. I think that the learned judge has misdirected himself and that he ought to have held the applicant entitled to compensation. The appeal must be allowed and the case must go back to the county court, not for rehearing, but to assess the amount of compensation, unless the amount is agreed.

FLETCHER MOULTON and FARWELL L.JJ. concurred.

Appeal allowed.

Solicitors: *Collyer-Bristow, Curtis & Co., for Baguley, Ashton-under-Lyne; Hewitt, Urquhart & Co., for F. S. Rhodes, Manchester.*

H. B. H.

C. A. 1909 *April* 1.

[IN THE COURT OF APPEAL.]

TUTTON *v.* OWNERS OF STEAMSHIP MAJESTIC.

Employer and Workman—Compensation—Refusal to undergo Surgical Operation—Period of Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The question whether a workman who has met with an accident and refuses to submit to a surgical operation is entitled to compensation under the Workmen's Compensation Act, 1906, beyond the period when he might have been expected to recover from the effects of the accident if he had submitted to the operation depends on the question whether his refusal is in the circumstances reasonable; and where the operation is of a serious character, and the workman, in good faith, follows the advice of his own doctor, whose honesty and competency are not impeached, he cannot be said to be acting unreasonably, although on the balance of the medical testimony given at the hearing the county court judge may find that the operation was one which might reasonably and properly have been performed.

Warncken v. *R. Moreland & Son, Ld.*, [1909] 1 K. B. 184, distinguished.

APPEAL from an award of the county court judge of Southampton sitting as arbitrator under the Workmen's Compensation Act, 1906.

On November 2, 1908, the applicant, who was a seaman on

the steamship *Majestic*, which was then about two days distant from New York on the outward voyage, was ordered to remove a screen across the deck, and while removing the screen he was knocked down by a gale of wind and sustained a double rupture. At the date of the accident he was fifty-one years old. He was taken back to Southampton and was attended by the ship's doctor.

On his arrival at Southampton on November 20 he was seen by Dr. J. R. Keele, one of the visiting surgeons to the South Hants Hospital, who advised him to undergo an operation.

On December 5 he was examined by Dr. Keele and Dr. H. W. R. Bencraft, the medical superintendent of Southampton Infirmary, on behalf of the shipowners.

After some correspondence with regard to the question of compensation, the shipowners on December 16 suggested that the applicant should submit to an operation.

On December 17 the applicant saw Dr. McDougall, who advised him not to undergo an operation, and in consequence of this advice the applicant declined to submit to an operation.

On January 26, 1909, the applicant filed a request for an arbitration as to the amount and duration of the compensation. The shipowners disputed their liability to pay compensation beyond the period when the applicant would have recovered if he had consented to an operation.

On March 3, 1909, the applicant was examined by Dr. Lawson Brown, an anæsthetist, who also advised him not to undergo an operation.

All these doctors were called as witnesses at the hearing of the application. Dr. McDougall said that he found that the applicant was suffering from Bright's disease and that in consequence of that disease he advised him not to have an operation. He thought it would be barbarous for him to undergo an operation without anæsthetics, and with kidney disease an anæsthetic would be a risk to life. In cross-examination he added that the anæsthetic would be more dangerous in the applicant's case because there was a small enlargement of the heart. Dr. McDougall's opinion was confirmed by the evidence of Dr. Lawson Brown.

C. A. 1909

TUTTON v. OWNERS OF STEAMSHIP MAJESTIC.

Dr. Keele said that he was not aware of the kidney disease on the first occasion when he saw the applicant, but that he was on the second occasion. In his opinion it would not have been unwise for the applicant, having regard to the kidney disease, to be operated upon. The use of a general anæsthetic would have been a risk, but not a great one. If local anæsthetics were used there would be no appreciable pain and no appreciable risk to life.

Dr. Bencraft said that there was no appreciable risk in a rupture operation with local anæsthetics; there was no difficulty whatever in such an operation.

The learned county court judge thought that the case fell within the principle of *Warncken* v. *R. Moreland & Son, Ld.*(1) He found as a fact that the operation was under the circumstances one which could be performed with the ordinary precautions with very slight risk to the applicant, that it was a reasonable and proper operation, and that the applicant acted unreasonably in refusing to submit to it. He also found that two months would be a reasonable time within which the applicant could be expected to recover from the suggested operation. He therefore awarded that the applicant be paid compensation at the rate of 16*s.* 6*d.* per week from the date of the arrival of the ship at Southampton up to February 25, 1909.

The applicant appealed.

P. T. Blackwell and *Martin O'Connor*, for the applicant. The applicant acted reasonably in refusing to undergo an operation on the advice of his own doctor. There is no evidence to support the finding of the county court judge.

[They were stopped.]

Sanderson, K.C., and *Ernest Charles*, for the respondents.

[COZENS-HARDY M.R. Can we as a matter of law say that a man is acting unreasonably if he follows the advice of his own doctor honestly given?]

This is not a question of law, but a question of fact. The question of reasonableness is a question of fact, and the circumstance that a man is acting on the advice of his own doctor is

(1) [1909] 1 K. B. 184.

merely an item of evidence to be taken into account in determining that question. The consequence of holding otherwise would be that an undetected malingerer who had been told by the most eminent doctors in the land that he ought to have an operation might find a doctor who was honestly opposed to all operations and could then claim compensation for an indefinite time. Assuming that this is a question of fact, there is ample evidence to support the judge's finding. This case is governed by *Warncken* v. *R. Moreland & Son, Ld.* (1)

COZENS-HARDY M.R. This is, no doubt, an important case, but, as I have formed a clear view upon the point, I do not think that anything would be gained by reserving judgment. The facts may be shortly stated. The applicant was employed as an ordinary sailor on board a vessel. He met with a severe accident—a double rupture—and he was taken to Southampton. He was not a young man, and he was suffering from Bright's disease. He was attended first by the ship's doctor. On arrival at Southampton he saw a local doctor. He was asked whether he would undergo an operation. He consulted his own doctor, who gave evidence, and his own doctor, who was aware of the man's general state of health and of the serious disease from which he was suffering, said that under no circumstances would he advise an operation. He thought it would be attended with risk. He says, "I found him suffering from rupture on each side. I found that his kidneys were wrong. He had Bright's disease. I advised not to have an operation in consequence of the disease of the kidneys. I thought it would be barbarous for him to undergo an operation without anæsthetics. With kidney disease an anæsthetic would be a risk to life." On cross-examination he adhered to that statement and added that there was a small enlargement of the heart.

Now what is the test which was clearly laid down by this Court in the case of *Warncken* v. *R. Moreland & Sons, Ld.* (1) as recently as November last, and was also clearly laid down previously by the Scotch Courts and was, I think, indicated, although perhaps not so clearly laid down, by this Court in *Rothwell* v. *Davies*? (2)

(1) [1909] 1 K. B. 184. (2) (1903) 19 Times L. R. 423.

C. A. 1909

TUTTON v. OWNERS OF STEAMSHIP MAJESTIC.

Cozens-Hardy M.R.

Of course there is no power to compel a man to undergo an operation, but on the other hand he must act reasonably, and in *Warncken's Case* (1), where a man refused to follow the advice of his own doctor to undergo an operation, which his own doctor said was trivial, we said—and I desire in no way to recoil from that proposition—that his continued disability was not due to the accident, but was due to his own unreasonableness in refusing to submit to the operation. I think the test is not whether on the balance of medical opinion the operation might reasonably be performed, but whether the man in refusing to undergo the operation acted unreasonably. I altogether decline to say that in the case of an operation of this kind a man can be said to act unreasonably in following the advice of a competent doctor, even though on the balance of medical evidence given at a subsequent date the county court judge might come to the conclusion that the operation was in its nature one which might reasonably and properly be performed. I think there is nothing in the view which I have expressed which is in any way inconsistent with anything that fell from the Court in *Warncken's Case*. (1) I think that the learned county court judge applied his mind to this proposition: Is this an operation which, on the balance of medical evidence, may reasonably be performed? That I venture to think is not the question. The question is, Did the man act unreasonably in refusing to undergo this operation after his own doctor had stated that the administration of anæsthetics would be attended with danger to life in the case of a man who had kidney disease and an enlarged heart, and that it would be barbarous to undergo the operation without anæsthetics? In my view the learned county court judge has misunderstood our judgment in *Warncken's Case* (1) and has misdirected himself, and I feel no doubt that in this case there was no evidence that the man acted unreasonably in refusing to undergo an operation in the circumstances I have stated. In my opinion this appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion and for the same reasons. Here it appears to me that the learned

(1) [1909] 1 K. B. 184.

county court judge has confused two totally different issues—one, if I may so call it, the unreasonableness of the operation, and the other the unreasonableness of the man. Now it is clear that all the medical evidence given by persons who had never seen the man before they saw him for the purpose of giving their evidence as to the reasonableness of the operation would be absolutely irrelevant upon the question of the reasonableness of the man. Upon that issue you have only to consider what was brought to his notice at the time when he made the decision he did—you have to ask yourself whether the man in those circumstances acted reasonably. It appears to me that there was not a shadow of evidence to the contrary. The facts seem to be these. He went to the hospital and was examined there by the hospital doctor—clearly only superficially—that is to say, the injury alone was examined. The doctor thought he should undergo an operation. Then he went to his own doctor, and his own doctor examined him very carefully and formed the strongest opinion that he ought not to undergo an operation and gave him that advice. That is all the advice that he had before the date at which it is said he acted unreasonably in refusing to have an operation. It is true that the doctor he saw first and another doctor saw him again on behalf of the respondents, but it is clear that they gave him no advice on that occasion, and it must be remembered that they saw him then on behalf of the respondents. Under those circumstances to say that a man who follows the advice of his own doctor, given after a careful examination which elicited facts which could not have been in the knowledge of the doctor who saw him first and advised the operation, can be held to have acted unreasonably when there is no suggestion of bad faith either on the part of the doctor or on the part of the man appears to me to be impossible. The learned county court judge appears to have thought that he had to decide on what I may call the abstract reasonableness of the operation considered as an operation. The real issue, as I have said, is the reasonableness of the man, and as to that I have no doubt that we ought to hold that the man acted reasonably.

C. A. 1909

TUTTON v. OWNERS OF STEAMSHIP MAJESTIC.

FARWELL L.J. I am of the same opinion. The real question underlying these cases is, as was put by the Master of the Rolls in *Warncken's Case* (1), whether the continuance of incapacity is due to the original accident or due to the workman's unreasonable refusal to take a step which any reasonable man would take. Of course we were there bound by the decision of this Court in *Rothwell* v. *Davies* (2), which in its facts is singularly like this case. There the Master of the Rolls said that "there was nothing in the Act which imposed on a workman an obligation to submit to a surgical operation. All the medical men agreed that the proposed operation would be attended with some risk, some said with serious risk. He could not understand how any judge could possibly be expected to take upon himself the responsibility of ordering a man to undergo such an operation." In this case the Master of the Rolls has already read the evidence of the doctor who says that it would be barbarous to perform the operation on the man without an anæsthetic, and a risk to life, having regard to the kidney disease, if he had an anæsthetic. The real issue for the learned county court judge to decide is the reasonableness of the individual in acting as he did. He acted on medical advice which to my mind amply justified his refusal to have the operation. It is of course open to the employer to challenge both the honesty and the competency of the doctor who gives that advice. It is also open to him to allege and prove that the man is shamming. But neither of those points is taken in this case. It was treated as if it were a question of the balance of medical testimony. In my opinion it is nothing of the sort. In my judgment the medical evidence called by the respondents was quite beside the mark and it was not relevant to the issue whether the man was acting reasonably in acting upon his doctor's advice. I fail to see how I can be said to be unreasonable if I take the advice of a competent doctor who tells me not to have an operation because afterwards half a dozen eminent doctors say I was very foolish not to do so. I consider I should be acting quite reasonably in acting upon my own doctor's opinion, assuming him to be reasonably believed

(1) [1909] 1 K. B. 184. (2) 19 Times L. R. 423.

by me to be a competent man. I cannot see here any evidence to justify the finding of the county court judge.

C. A. 1909

TUTTON v. OWNERS OF STEAMSHIP MAJESTIC.

Appeal allowed.

Solicitors: *W. B. Blackwell & Co.; Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

H. B. H.

[IN THE COURT OF APPEAL.]

C. A. 1909 *March* 30.

TOMALIN *v.* S. PEARSON & SON, LIMITED.

Employer and Workman—Compensation—Accident happening Abroad—Claim by Dependant—Jurisdiction—Scope of Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58).

The Workmen's Compensation Act, 1906, has no application outside the territorial limits of the United Kingdom, except in the case of seamen and apprentices as provided by s. 7.

Where an English workman in the employment of English contractors was sent out by them to Malta to work for them there, and met with a fatal accident:—

Held, that his widow was not entitled to compensation under the Workmen's Compensation Act, 1906.

APPEAL against the award of the judge of the county court of Dover upon a claim for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether the Act applied to the case of an accident happening abroad.

The applicant was the widow of John Thomas Tomalin, deceased, a domiciled and resident Englishman. The respondents were an English company, having their registered office in London, and were contractors for public works, amongst others for the breakwater at Dover. The deceased was a fitter in their employ, and had worked for them for several years up to May 27, 1907, at Dover. In July, 1907, the respondents, having a contract for the construction of breakwaters at Malta, engaged the deceased to go and work for them there. The terms of the engagement were set forth in a letter addressed to the deceased, and dated July 18, 1907, under which he was to get

C. A. 1909

TOMALIN v. S. PEARSON & SON, LIMITED.

2*l.* 10*s.* a week as a fitter while at Malta, his passage out was to be paid, also 25*s.* a week during the time he was on the journey, and his passage home was also to be paid at the conclusion of satisfactory service. In accordance with that letter the deceased went out to Malta on July 20, 1907, and continued in the service of the respondents there, working regularly on the breakwater contract from the time of his arrival until August 24, 1908, when he was killed by accident arising out of and in the course of his employment. His widow claimed compensation under the Act of 1906, and if entitled to it the amount was not in dispute, but her title to compensation was disputed as a question of law. The county court judge held that the applicant was entitled to compensation. The contractors appealed.

Danckwerts, K.C., and *Raymond Asquith*, for the appellants, after stating the facts, were stopped.

Waddy, for the respondent. The workman being English, the contractors English, and there being no intention on the part of the workman to settle in Malta, the reasonable inference is that both parties regarded their contract as made with reference to the existing English law, and the lex loci contractus, and not the lex loci solutionis, governs its interpretation.

[COZENS-HARDY M.R. The widow was no party to the contract; she has a statutory and independent right of her own to compensation, and the employers were under a statutory obligation to pay in the event of death: *Darlington* v. *Roscoe & Sons.* (1)]

The workman might have had the English statute in mind when he accepted the employment abroad. *Darlington* v. *Roscoe & Sons* (1) shews that the workman himself has the statutory right also. Had this man only been injured instead of killed, he could have recovered compensation on his return; the same principle ought to be applied in favour of his dependants where the accident results in death.

Take the case of a chauffeur or valet engaged in England who goes abroad with his master and meets with an accident; is he to lose this statutory right? The Act applies to British subjects for the time being employed in Malta or elsewhere abroad.

(1) [1907] 1 K. B. 219.

The statement in Maxwell on the Interpretation of Statutes, pp. 212, 213, as to the presumption that the Legislature does not intend its statutes to operate outside the United Kingdom is too general and is not borne out by the cases cited. The real test would seem to be that stated in *Attorney-General* v. *Stewart* (1), namely, is it a law of local policy adapted solely to the country where it was made, or is it equally applicable to any country so far as accidents are concerned? It was an Act with a general operation. Acts of this character should be construed generously: *Davidsson* v. *Hill.* (2)

COZENS-HARDY M.R. This appeal raises a curious and important question. The respondents are a well-known firm of contractors, and they are a British company. They entered into a contract for the erection of certain works at Malta, and for the purpose of that contract they engaged a workman by contract in England and he went out to Malta; he did his work there for some considerable time, and in the course of that work he met with an accident which proved fatal. The claim is made by his widow, who says: Under the Workmen's Compensation Act I am a dependant, and I am entitled to compensation against the employers by reason of the fatal accident which my husband met with at Malta. The learned county court judge has held that the claim is a good claim. From that the respondent appeals, and the only question for us is whether in point of jurisdiction such a claim can be maintained. In my opinion it clearly cannot. It has been decided beyond all doubt, so far as this Court is concerned, that a separate and independent right is given to the dependant—in this case given to the widow. That is put beyond all doubt in the decision in *Darlington* v. *Roscoe & Sons.* (3) There the alleged cause of action arose out of the statutory duty which survived to his executors; and Lord Collins, then Master of the Rolls, said (4): "Here a statutory duty, not to do something, but to pay a sum of money, existed for the benefit of the dependant when she died, and that case" (meaning *Peebles* v. *Oswaldtwistle Urban District Council* (5))

(1) (1817) 2 Mer. 143, 160.
(2) [1901] 2 K. B. 606.
(3) [1907] 1 K. B. 219.
(4) [1907] 1 K. B. at p. 227.
(5) [1896] 2 Q. B. 159.

C. A. 1909

TOMALIN v. S. PEARSON & SON, LIMITED.

Cozens-Hardy M.R.

"seems to me a distinct authority that the right to performance of that duty survived to her legal personal representative"; and in that case I said, and I venture to repeat here (1), that "there was a statutory obligation on the part of the employers in this case to pay in the event which happened a definite sum to the widow, as being the sole dependant of the deceased workman." Farwell L.J. gives judgment precisely to the same effect.

What is the widow's claim here? She is claiming, not as a party to the contract, not as claiming any rights under a contract made by her or by any person through whom she claims, but she is simply claiming the performance by the defendants of a statutory duty, which statutory duty is said to be found in the Workmen's Compensation Act. Now that brings us face to face with this proposition. What is the ambit of the statute and what is the scope of its operation? It seems to me reasonably plain that this is a case to which the presumption which is referred to in Maxwell on the Interpretation of Statutes in the passage at p. 213, which has been read by Mr. Waddy, must apply: "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom." But if I had any doubt on the case apart from the section which I am going to refer to, that doubt would be removed by reference to s. 7 of the Act itself, in which there is an extension of the operation of the Act to accidents occurring outside the United Kingdom. It has a very guarded and a very limited application indeed. It applies to "masters, seamen, and apprentices to the sea service and apprentices in the sea fishing service provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner or . . . . managing owner or manager resides or has his principal place of business in the United Kingdom," subject to certain modifications. So that, even in the case of seamen, when they expressly desire to include them, they limit and confine it most carefully to

(1) [1907] 1 K. B. at p. 228.

persons who, and who alone, could claim to be entitled to the benefit of this Act. In my opinion the present claimant, who seeks to enforce her statutory right in respect of an accident that occurred in Malta, has not any right to claim the award which she is claiming. In my opinion the appeal must be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The right alleged by the widow cannot be a contractual right, because she was no party to the contract. It must be a statutory right; it arises by virtue of the statute out of an accident happening to a person who has, if I may use the phrase, the status of a workman; that is to say, a person between whom and the person who is sought to be made liable there exists the relationship of workman and employer. And as this is a statutory right, we are driven to inquire what is the ambit locally of the operation of the statute.

It clearly cannot apply universally all over the world. I have no doubt, for the reasons the Master of the Rolls has given, it applies to the United Kingdom alone. The accident must be one happening in the United Kingdom to a person there who has the status of a workman to some employer who, in some way or another, is made liable to the jurisdiction of this Act. If that had been so, then I think the widow would have had a good claim, but here it is clear the accident did not happen within those local limits, and in my opinion the decision of the county court judge cannot be upheld.

FARWELL L.J. I am of the same opinion. The question is one purely of the construction of the statute. The words of s. 1, sub-s. 1, are so wide that some limitation must necessarily be affixed to them. The words are, "If in any employment personal injury by accident arising out of and in the course of the employment is caused to any workman," and so on. To my mind the words "any employment" there must be restricted to employment within the ambit of the United Kingdom or on the high seas as provided by s. 7. I do not propose to go through the Act with any particularity. I have looked through the sections several times; but even if a workman could claim to be such within the

C. A. 1909

TOMALIN v. S. PEARSON & SON, LIMITED.

Farwell L.J.

definition of s. 13 so far as regards a contract entered into in England, that would not extend the ambit of the employment, which, as I have already said, must be restricted to employment within the United Kingdom or high seas as already stated; in other words, the generality of the term "workman" in s. 13 is limited by the restriction of the term "employment" apparent from the rest of the Act.

It is not, perhaps, absolutely immaterial to point out that absence from the United Kingdom is one of the excuses for not giving notice within six months under s. 2, sub-s. 1 (*a*).

I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Mowll & Mowll, for Mowll & Mowll, Dover; H. G. Campion & Co., for Ernest E. Chitty, Dover.*

W. C. D.

C. A. 1909 *March* 30.

[IN THE COURT OF APPEAL.]

OWNERS OF THE VESSEL TYNRON *v.* MORGAN.

Employer and Workman—Compensation—Practice—Review of Weekly Payments—Nominal Award—Jurisdiction—Suspensory Order — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application by an employer under the Workmen's Compensation Act, 1906, Sched. I. (16.), to have the weekly payments reviewed on the ground that the incapacity no longer existed, there is jurisdiction, in a case where the incapacity, owing to the effects of the original accident, may recur, to suspend instead of ending the compensation by awarding a nominal sum or by making a declaration of continuing liability, and this is the proper course to be adopted in these cases.

Singer Manufacturing Co. v. *Clelland*, (1905) 42 Sc. L. R. 757, questioned on this point.

APPEAL from an award of the judge of the county court of Cardiff sitting as arbitrator under the Workmen's Compensation Act, 1906.

This case is reported in consequence of the observations of the Court as to the practice to be adopted on an application by an

employer to review the weekly payments under an agreement between him and his workman in cases where the latter is at the time able to resume his ordinary work, but there is a probability or possibility of the incapacity recurring.

The workman in this case was the mate of a sailing vessel, and on a voyage from the Irish coast to Runcorn he met with an accident which admittedly arose out of and in the course of his employment, by which he was ruptured. As soon as the vessel reached the Mersey he was medically examined; the doctor certified that he was unfit for work; he was paid off, and an agreement was entered into under which his employers paid him 19*s.* 6*d.* a week during incapacity.

In December, 1908, the workman having apparently recovered by wearing a truss, the employers applied to review the weekly payments; the workman was examined by two doctors, one employed by the employers and the other by the workman; and on January 15, 1909, the county court judge came to the conclusion, on the balance of the medical evidence, that the workman was so far restored by means of the truss that he was able to resume his work as a mate, and he thereupon terminated the weekly payments.

The workman appealed.

Douglas Hogg, for the appellant. The proper course to adopt in this case was to suspend the agreement by means of a nominal payment of a penny a week; the incapacity may recur, and then the workman ought to be in a position to apply for a review of the weekly payments and get an increase. The agreement ought not to have been ended.

[He was stopped.]

Parsons, for the employers. It seems doubtful whether the county court judge has jurisdiction to make a suspensory award so as to keep the workman's claim alive in case of the incapacity from the original accident recurring: *Nicholson* v. *Piper*. (1)

In *Singer Manufacturing Co.* v. *Clelland* (2) the Scotch Court held that the arbitrator had no power to suspend the agreement for compensation by awarding a nominal sum; he must consider

(1) [1907] A. C. 215. (2) 42 Sc. L. R. 757.

C. A. 1909

OWNERS OF THE VESSEL TYNRON v. MORGAN.

the facts and either end, diminish, or increase the amount. The county court judge here has considered the evidence and ended the payments.

COZENS-HARDY M.R. This appeal raises a point upon which we have not had the advantage of any reasoned judgment of the learned county court judge, but, having the reasons which do appear in his judgment, and which have been very fairly admitted by Mr. Parsons, I have no doubt what our order ought to be. [Having stated the facts, the Master of the Rolls continued:—]

On December 11 the employers took out an application to review, to reduce or terminate, the award. Then the man was examined by two doctors, one employed by the employers and the other by himself, and when the matter came before his Honour on January 15, three days afterwards, his Honour took the view, which I at once accept, that on the balance of the medical evidence the man, who had then a truss, was so far restored that he was able, in the learned judge's opinion, to resume his work as a sailor. That the workman is now able to resume his work as mate is not seriously disputed by Mr. Hogg; but he says that the award ought to be made in a shape which would not end the workman's right to compensation for ever by terminating absolutely the liability, but that it ought to be made in such a shape as to keep alive the employers' liability if it should appear, as is extremely probable, that the effects of the original accident, quite apart from a subsequent accident, would so far develop themselves hereafter that the workman might be entitled to have the award reviewed in his favour, just as it is now being reviewed in favour of the employers.

The county court judge was asked on behalf of the workman to make what is sometimes called, not quite accurately, a suspensory award—that is to say, to award a nominal sum of a penny per week, or to make a declaration of liability, it does not matter which way you put it. I feel no doubt whatever in the case of an accident of this kind—in the case of rupture, when at the very moment it was before the learned judge the workman was wearing a truss—a suspensory award ought to be made.

Then it is said on behalf of the employers that it has never been

decided that there is any jurisdiction to make a suspensory award, and that the Scots Courts in one case have expressed a doubt whether it is competent to do so. All I can say is that the Court of Appeal, to my certain knowledge, for many years has taken the view that it is competent to make such an award. There is probably not a county court judge in the country who has not acted on that view, and I think it would be entirely wrong for us now to raise any doubt whatever as to the jurisdiction of a county court judge, or of this Court, in a proper case, to make what is called a suspensory award. I very much doubt whether the Scots Courts in *Singer Manufacturing Co.* v. *Clelland* (1) intended to decide the point which Mr. Parsons has put. All I can say is, if they did go so far as he has suggested, I am not prepared to follow them, and I think it right to adhere to the view which this Court has invariably taken.

In my opinion this appeal must be allowed to the extent of altering the award by awarding a penny a week to the workman, the appellant, and he must also have the costs of the appeal.

FLETCHER MOULTON L.J. I am of the same opinion. This is a case in which a workman receives a permanent injury, the effect of which is that, by using proper appliances, he is now able to earn as much as he could at the time of the accident, although there has been a period during which he was totally incapacitated from work. Under these circumstances the owners, as they are entitled to do, apply for a review; they do not wish to pay him on the basis of total incapacity any longer, because, for the moment, he is earning his full wages. This power of review from time to time of the compensation payable is a most useful one. It is intended, in justice to both parties, to make the compensation payable at any time fit in with the then earning power of the injured workman. If he gets better and can earn money, it is right that the compensation should be diminished. If he gets worse, it is right that the compensation should be greater, inasmuch as the compensation is intended to fit closely to the actual diminution of the earning power of the workman. This power of review is therefore one of very great importance.

(1) 42 Sc. L. R. 757.

C. A. 1909

OWNERS OF THE VESSEL TYNRON v. MORGAN.

Fletcher Moulton L.J.

It must not, however, be allowed to work injustice to the workman, and I will put a case which I think shews conclusively that, where there is a permanent injury, no judge is entitled to treat the fact that a man can at the moment earn just as much as he could before his accident as being a justification for terminating the compensation. Suppose there is an injury which produces incapacity only in the winter; in other words suppose that in the summer, when the weather is fairly warm, the man can work as well as he could previously to the accident, but in the cold weather he is wholly or partially incapacitated, and that the owners apply in the summer for a review. They are perfectly entitled to have the compensation cut down to a nominal amount at the time, but they are not entitled to have the compensation terminated, because, if once terminated, it cannot be reviewed again. If we were to hold that the fact that the man was earning full wages at the moment of review was sufficient to entitle the compensation to be terminated, the consequence would be that the county court judge, with full knowledge of the admitted fact that when the winter came on the man would develop an incapacity due to the accident, would be obliged to stop all compensation for the future. The tribunals which have to administer this Act have got out of the difficulty by granting an award for nominal compensation, so long as the immediate earning powers are not diminished, when there is reason to believe that they are not permanently as great as they were before the accident. This Court has again and again had to deal with such awards, and has treated them as valid, and I think that they are in the interest of both parties. I join with the Master of the Rolls in holding that it is proper to make such awards, and that it is the duty of the county court judge to make them, and not to terminate the payment of compensation, whenever there exists a permanent injury which may in future develop and lessen the earning power, because if it develops under ordinary circumstances, without the interposition of an accident, it will be right to consider the loss of earning power when it supervenes as being the consequence of the accident. To enable the workman to get proper compensation it is therefore necessary to assess a nominal amount so long as

the injury to the earning power is not actual, but only latent; and when that is done, it gives to the judge the power of making the compensation substantial when the injury to the workman's earning power becomes active again. Therefore the practice of making a suspensory order ought to be followed in this case. I might say in the present case that I think that the workman might have demanded something more substantial than a penny a week, but the penny keeps alive his rights, and so he is probably wise in contenting himself with asking for that.

FARWELL L.J. I am of the same opinion. I do not think that the point taken by Mr. Parsons is really open to us in this Court. As Lord Halsbury says in *Nicholson* v. *Piper* (1), "a practice has existed now for some years of making a nominal payment in order to keep the question alive." That practice, to my knowledge, on several occasions has been discussed, and orders have been made on the footing that such a practice is in accordance with the Act, and I do not think it is competent for this Court to adopt a contention which would involve the proposition that those orders were wrong. We are bound by the conclusion that enabled the Court to make those orders.

Speaking for myself, I am unable to follow the reasoning of the learned Lord President in *Singer Manufacturing Co.* v. *Clelland* (2); if he intended to lay down a general proposition, not confined to the facts of the particular case before him, I cannot agree with it, though, as applying to the facts before him, the judgment appears to be perfectly right. The Workmen's Compensation Act, 1906, deals with an actual award already made, and provides by Sched. I. (16.) that any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum, and so on. If it is once ended, it is plain that no further review is possible. That was involved in the decision in *Nicholson* v. *Piper*. (3) If the learned county court judge is satisfied that all the effects of the accident, present or future, have disappeared, then of course he may end

(1) [1907] A. C. 215, at p. 218. (2) 42 Sc. L. R. 757.
(3) [1907] A. C. 215.

C. A. 1909

OWNERS OF THE VESSEL TYNRON v. MORGAN.

Farwell L.J.

it. If on the other hand, as in the present case, it is plain that the man, although he has recovered sufficiently to earn his full wages for the present, is in a condition which may probably render him unable to do so in the future, it is the duty of the county court judge to diminish it to a nominal sum, because although there is no substantial amount payable for compensation it is necessary to keep the application alive in order to retain jurisdiction, so as to enable justice to be done, if and when the further consequences of the original injury caused by the accident shall again shew themselves. In the same manner there is a provision that the compensation may be increased. That appears to me to involve the same proposition. The county court judge first makes an award, and then either ends it or diminishes it, or, having diminished it, again increases it. I cannot see that there is any doubt as to the intention of the Act of Parliament.

Appeal allowed.

Solicitors: *G. R. Thorne, Robinson & Co.; Prichard & Sons, for Donald Maclean & Handcock, Cardiff.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 30.

EAVES *v.* BLAENCLYDACH COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Review of Weekly Payments—Earning Capacity of Workman—Nervous Prostration—Loss of Will Power—Physical and Muscular Recovery—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application by an employer under the Workmen's Compensation Act, 1906, Sched. I. (16.), to have the weekly payments reviewed, the nervous and mental as well as the physical condition of the injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity. It is not sufficient for the employer to shew that the muscular and physical mischief caused by the accident has come to an end.

APPEAL from an award of the judge of the county court of Pontypridd sitting as arbitrator under the Workmen's Compensation Act, 1906.

The only question raised by this appeal which requires any detailed report was whether the nervous and mental condition of an injured workman ought to be taken into consideration in estimating the extent of his recovery and consequent earning capacity. The facts so far as material were as follows:

In May, 1905, the applicant, a collier in the employ of the respondent company, was injured by a large stone, weighing about half a hundredweight, falling on his right foot, which at that moment was on a tram rail.

The company accepted their liability and entered into an agreement to pay the workman 18*s.* a week from the time of the accident, and this payment was continued till September, 1908, when the company applied to review the agreement and to have the amount of compensation reduced or terminated. The county court judge found that the man ought to have gone back to work before and that he was not entitled to further compensation. On appeal, on the ground of misdirection, the matter was remitted to the county court judge for reconsideration.

In January, 1909, when the matter was reheard, there was medical evidence to the effect that the applicant was physically

C. A. 1909

EAVES v. BLAENCLYDACH COLLIERY COMPANY, LIMITED.

and muscularly sound and had no organic disease, but that his right leg up to the knee was absolutely devoid of sensation, so that a pin might be driven into it without the man feeling any pain; that upon the man being made to stand the leg collapsed under him and he fell to the ground; the alleged cause of this was stated to be a certain mental condition which prevented him from driving the necessary impulse into the leg to make it a useful limb like the other leg and the same as this leg was before the accident.

The evidence proved that the applicant was suffering from traumatic neurasthenia and anæsthesia of the leg as a consequence of the accident; that traumatic neurasthenia was a real complaint, and that it had affected the applicant's mental condition and destroyed his will power.

The county court judge came to the conclusion on this evidence that the loss of sensation did not affect the muscular power or the physical power to work; that he was able to do the ordinary work of a collier; that the applicant was not malingering, but was under the genuine belief that he was incapable of working; but on these findings he nevertheless reduced the compensation payable under the agreement to a penny a week.

The applicant appealed.

Rufus Isaacs, K.C., and *A. Lincoln Reed*, for the appellant.
C. A. Russell, K.C., and *Parsons*, for the respondents.

COZENS-HARDY M.R. This is an appeal from the judgment of a county court judge, and it is the second time that this matter has come before this Court. I cannot help thinking that the learned judge has misapprehended the view which was taken by this Court on the former occasion and has again misdirected himself.

In so far as the learned judge has found the facts we have no desire to interfere with his decision. He has told us plainly what the facts are in his view, and I accept those findings of fact.

The short material facts are these. The man was a collier

and he met with an accident which arose "out of and in the course of his employment"; that is beyond all doubt. For a considerable time he received compensation from his employers on that footing, and the learned county court judge, in a passage which I will read in a minute, finds that the evidence satisfies him that the muscular mischief caused by the accident has come to an end, or perhaps (to express what I mean to say more accurately) that so far as muscular power is concerned he is in the same condition in which he was before the accident, and so far as that is concerned he is competent now to do the ordinary work of a collier. He also finds another thing which is equally plain, that the workman is not malingering—that he is not shirking the work with any desire or intention to avoid it. The learned judge says he thinks that, although the man honestly believes he is not able to do the work, and although he is not shamming or malingering, it is sufficient for the employers to shew that the muscular mischief is at an end. I am entirely unable to assent to that view. The effects of an accident are at least twofold: they may be merely muscular effects—they almost always must include muscular effects—and there may also be, and very frequently are, effects which you may call mental, or nervous, or hysterical, whichever is the proper word to use in respect of them. The effects of this second class, as a rule, arise directly from the accident from which the man suffered just as much as the muscular effects do, and it seems to me entirely a fallacy to say that a man's right to compensation ceases when the muscular mischief is ended, though the nervous or hysterical effects still remain. [The Master of the Rolls then quoted passages from the judgment of the county court judge to shew that he had misdirected himself in applying the facts, and continued:—] The result of this judgment, however, is that the man is still suffering from the accident, and he has not wholly recovered from the nervous effects of the accident, which are just as real and just as important as the muscular effects and make him unable to work. I hope nothing that I say here will ever be supposed to give any colour to malingering; and if the learned judge had found that the man was malingering, the position, of course, would have

C. A. 1909

EAVES v. BLAENCLYDACH COLLIERY COMPANY, LIMITED.

Cozens-Hardy M.R.

been entirely the other way, and that would have been a question of fact for him, and we should not have interfered with the finding. The learned judge has not found that the man was malingering—he has said so in express terms—and, that being so, having regard to what I said before, he has plainly misdirected himself in the award which he made in altering the compensation, in fact terminating it, subject only to the penny a week.

In my view, therefore, this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. It is quite clear that serious muscular and nervous consequences followed from the accident that happened to this workman. The muscular consequences have disappeared, but that the nervous consequences still remain is common ground, because there is the very remarkable fact of almost total anæsthesia of the leg, which is deposed to by the witnesses on both sides. As I read the finding of the learned county court judge, he finds that because the sole results are nervous and not muscular they are not the consequence of the accident and do not justify an award of compensation. In my opinion, so long as these serious consequences remain, the man is entitled to compensation just as much as if his muscular power had not come back.

FARWELL L.J. I am of the same opinion. The fallacy, with all respect to the learned county court judge, which appears to me to underlie his judgment is this, that he has totally disregarded nervous complaints. A man may be a strong man in so far as his muscular powers are concerned, but he may be suffering from a railway accident in which he had a very bad shock; his nerves may be shattered, and this nervous complaint may be perfectly real. Of course it is exceedingly difficult for a county court judge in many cases to determine whether it is really a nervous complaint or whether the man is shamming. Here the judge has excluded shamming, but he has ruled that the man is physically capable of working, and has disregarded the nervous affection. The man is suffering from traumatic neurasthenia and he has not recovered from it. Therefore he has not

recovered his earning capacity and is still entitled to compensation. The learned judge has misunderstood the reasons this Court had in sending the case back.

C. A. 1909

EAVES v. BLAENCLYDACH COLLIERY COMPANY, LIMITED.

Appeal allowed.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Evan Davies, Pontypridd.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A. 1909 *March* 31.

MORTIMER *v.* SECRETAN.

Employer and Workman — Injury to Workman—Permanent Incapacity — Compensation—Weekly Payments — Redemption — Agreement for Lump Sum—Memorandum—Registration—County Court Judge—Jurisdiction—Power to assess Amount—"Such order as under the circumstances he may think just"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. II., cl.* 9 (*d*).

Where the registrar of a county court has refused to register an agreement between an employer and a workman, who has been injured in his service, for the redemption of a weekly payment by a lump sum, on the ground of the inadequacy of the sum agreed upon, and has referred the matter to the judge under Sched. II., cl. 9 (*d*), of the Workmen's Compensation Act, 1906, the sole question for the judge is whether the agreement is one which ought or ought not to be recorded. He is not entitled to treat the agreement as a submission by the employer to pay any sum which the judge may, under the circumstances, think reasonable.

APPEAL from an order of the judge of the Surrey County Court holden at Lambeth.

On August 31, 1908, Annie Mortimer, a domestic servant, was accidentally injured by falling down some steps while in the employment of Mrs. Secretan. Her average weekly earnings, computed under the Workmen's Compensation Act, 1906, were 17*s.* 8*d.* She was totally incapacitated for five months, and it was likely that her partial incapacity would be permanent. After the accident her employer made weekly payments to her of 8*s.* 10*d.* down to January 30, 1909, when the parties entered into an agreement whereby the employed agreed to accept the sum of 80*l.* as a lump sum in full satisfaction of all her claims against the employer in respect of the injury. The said sum of 80*l.* was

C. A. 1909

MORTIMER v. SECRETAN.

to be paid into Court upon a memorandum of the agreement being recorded under Sched. II., cl. 9, of the Act.

Upon an application for registration the registrar of the county court refused to record the memorandum, on the ground that the lump sum agreed to be paid was inadequate, and he referred the matter to the judge. The judge found that the sum of 80*l.* was inadequate, and assessed the amount to be paid by the employer at the sum of 285*l.*, that being the amount which admittedly would be payable if computed under Sched. I., cl. 17, of the Act. From this decision the employer appealed, on the ground that the judge had no jurisdiction to do anything more than direct that the agreement should or should not be recorded.

C. A. Russell, K.C., and *Harold Morris*, for the appellant. The county court judge has exceeded his powers under the Act. Under Sched. II., cl. 9 (*d*), he was only entitled to say that the agreement ought or ought not to be registered. Having refused to order it to be registered on the ground of inadequacy, he had no power to go on and fix what he considered to be an adequate sum for redemption of the weekly payment. The words "such order as under the circumstances he may think just" do not mean an order of this kind. The right to apply for redemption is by cl. 17 of Sched. I. confined to the employer, and he alone can ask for it. It is not for the county court judge in such a case to say upon what terms redemption ought to be. He can only order or refuse registration of the agreement. The decision of the county court judge is founded to some extent upon *Castle Spinning Co.* v. *Atkinson* (1), but that case has no bearing on the present. That was an application under the redemption section—Sched. I., cl. 13, of the Act of 1897—and in such a case the applicant leaves it to the county court judge to fix a sum.

[They were stopped by the Court.]

Edmondson, for the respondent. There is nothing in Sched. II., cl. 9, which deprives the county court judge of power to increase the amount mentioned in the agreement between the parties. The matter is referred by the registrar to the judge, who has power

(1) [1905] 1 K. B. 336.

to deal with it as he thinks just. Under r. 49, sub-r. 7, of the Workmen's Compensation Rules, 1907, the county court judge "may make such order or give such directions as he may think just," that is, he is to exercise a discretion on the question of adequacy, as he has done in this case.

COZENS-HARDY M.R. This order of the county court judge seems to me to be plainly wrong. The scheme of the Workmen's Compensation Act, 1906, as appears by cl. 17 of the First Schedule, is that the workman injured has no power to claim as against the employer a capital sum instead of the weekly payments to which he is entitled, but on the other hand the employer has a qualified right to terminate his liability to continue the weekly payments for an indefinite time. He may do it by purchasing an annuity from the National Debt Commissioners; that may be put on one side. He may also make an agreement with the injured workman, but not an agreement in the sense in which a master and servant would, under ordinary circumstances, make an agreement, for the Act contemplates that an agreement made between an injured workman and his employer, under which the workman is to receive a lump sum, ought to be carefully investigated, and it provides, in order to terminate the liability of the employer to continue the weekly payments, that the memorandum of agreement shall be recorded. The parties first have to go before the registrar, who acts not on evidence, but on information, and if he thinks the amount is inadequate, then he has to report it to the judge and has to give notice to the parties. Now here what happened was this: an admitted accident to a domestic servant; an agreement dated January 30 signed by both, or a draft, I suppose, which was approved by the servant, under which the master proposed that £80 should be paid into Court upon the memorandum being recorded, the servant agreeing to accept that lump sum in full satisfaction of all her claims and demands, and at the bottom of the agreement there is this, signed by the servant: "I have read this agreement and admit the genuineness thereof." The registrar, in the full exercise of his discretion, and I have no reason to doubt that it is a wise discretion, refused

C. A. 1909

MORTIMER v. SECRETAN.

Cozens-Hardy M.R.

to record the memorandum, and he then on February 4 gave notice to the parties or to the solicitors as follows: "I have refused to record the memorandum sent to me in this matter for registration, and have referred the matter to the judge, pursuant to proviso (*d*) to par. 9 of the Second Schedule to the Act, it appearing to me that the said memorandum ought not to be registered by reason of (*a*) the inadequacy of the lump sum agreed to be paid in redemption of the weekly payment referred to in the memorandum." Then an appointment is given when the matter will be inquired into by the judge. What was the matter? Simply and solely this—whether the memorandum submitted for registration was one which ought or ought not to be recorded. The learned judge had no power or right to do anything more than to say, Aye or No, this agreement is one which ought to be recorded, or it is one which ought not to be recorded. I do not mean he had not power to make any ancillary order under the clause which has been called to our attention, but he had no power to make any substantive order dealing with the whole matter, and certainly he had no power in a case where the employer and the workman have agreed upon a particular sum which the employer is willing to pay to treat that as a submission by the employer to pay any sum which the county court judge might think reasonable under the circumstances. In my opinion the learned county court judge has misconceived the Act and has misconstrued his power. All he could do was to dismiss the application with costs, the only effect of which would be that the admitted liability of the employer to continue the weekly payments will last until there is an application to review, or another more appropriate offer. In my opinion this appeal must be allowed, and, if the employer asks for it, it will be allowed with the usual costs.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree.

Appeal allowed.

Solicitors for appellant: *Barlow, Barlow & Lyde.*

Solicitors for respondent: *E. Horner Hargreave.*

G. A. S.

THE KING *v.* THE GOVERNOR OF HIS MAJESTY'S PRISON AT STAFFORD.

1909
March 23.

Ex parte EMERY.

Criminal Law—Insanity—Person totally deaf—Incapacity to understand Proceedings—Detention during His Majesty's Pleasure—Criminal Lunatics Act, 1800 (39 & 40 *Geo.* 3, *c.* 94), *s.* 2.

A prisoner who was totally deaf and could neither read nor write was arraigned for a felony. Upon being arraigned he stood mute, and a jury, duly impanelled and sworn for the purpose, found that he was mute by the visitation of God. The jury were sworn again to try whether he was capable of pleading to the indictment, and they found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others. Upon this finding the judge, acting under s. 2 of the Criminal Lunatics Act, 1800, ordered him to be kept in custody until His Majesty's pleasure should be known:—

Held, that the finding amounted to a finding that the prisoner was insane within the meaning of the Act, and that the order was properly made.

ORDER nisi to the governor of His Majesty's prison at Stafford to shew cause why a writ of habeas corpus should not issue directed to him to have the body of one Frederick Emery before the Court.

Frederick Emery, who was totally deaf and could neither read nor write, was arraigned upon an indictment for a felony before Channell J. at Stafford Assizes. Upon being arraigned he stood mute, and a jury, duly impanelled and sworn to try whether he stood mute of malice or by the visitation of God, found that he stood mute by the visitation of God. The jury were then sworn a second time to try whether he was capable of pleading to the indictment, and found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others. Channell J. thereupon ordered and adjudged that Emery should be treated as

1909

REX v. STAFFORD PRISON (GOVERNOR). EMERY, *Ex parte.*

non-sane and be kept in strict custody in His Majesty's prison at Stafford pursuant to the statutes in that behalf until His Majesty's pleasure respecting him should be known.

An order nisi for a writ of habeas corpus as above was obtained.

S. A. T. Rowlatt (*W. Allen* with him) shewed cause on behalf of the governor of the prison. The governor of the prison is protected by the order of the Court, and so long as that order stands no proceedings can be taken against him. For the protection of the governor it is necessary to point that out before proceeding to argue the question raised. The order of the learned judge was made under s. 2 of the Criminal Lunatics Act, 1800 (1), which authorizes the Court to order a prisoner who is found by the jury to be insane to be kept in custody until His Majesty's pleasure shall be known. In *Rex* v. *Pritchard* (2) Alderson B., following the course adopted by Parke J. in *Rex* v. *Dyson* (3), directed the jury that, if the prisoner did not understand the nature of the proceedings on the trial, they ought to find him to be of non-sane mind within the meaning of the Act. Those cases were approved and followed by the Court for Crown Cases Reserved in *Reg.* v. *Berry.* (4) In that case the jury who tried the prisoner found that he was not capable of understanding and had not understood the nature of the proceedings, and the Court construed that as a finding that the prisoner was insane and ordered him to be detained during Her Majesty's pleasure. Therefore the finding in the present case is equivalent to a finding that the prisoner is insane within the meaning of the Act of 1800 so as to entitle the Court to order him to be kept in custody until His Majesty's pleasure

(1) Criminal Lunatics Act, 1800 (39 & 40 Geo. 3, c. 94), s. 2: "If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment . . . . it shall be lawful for the Court before whom any such person shall be brought to be arraigned . . . . as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known . . . ."

(2) (1836) 7 C. & P. 303.

(3) (1831) 7 C. & P. 305, n.

(4) (1876) 1 Q. B. D. 447.

shall be known. That is the view taken in Russell on Crimes, vol. 1, 6th ed. p. 119, n. The order of the learned judge was therefore right. [He also referred to the resolution of the judges in *Rex* v. *Steel.* (1)]

S. R. C. Bosanquet, for the prisoner. Sect. 2 of the Criminal Lunatics Act, 1800, makes it a condition precedent to the exercise by the Court of the power to order a prisoner to be kept in custody until His Majesty's pleasure is known that the jury shall have found that the prisoner is not sane. In *Rex* v. *Dyson* (2) the jury found specifically that the prisoner was not sane, and *Rex* v. *Pritchard* (3) simply followed that case. The Court accordingly had power to deal with the prisoners in those cases under s. 2 of the Criminal Lunatics Act, 1800. Those cases are therefore distinguishable; but even if they are in point, they are only decisions of judges at the assizes and are not binding upon this Court and ought not to be followed. In Russell on Crimes, vol. 1, 6th ed. p. 119, n., it is stated that the proper course is to swear a jury to determine whether the prisoner is sane or not, on which issue the question is whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence. The issue, therefore, upon which the jury must find one way or the other is whether the prisoner is or is not sane. Here there is no finding of the jury that the prisoner is not sane. It would be a straining of language to construe the finding as one of insanity; the finding in effect negatives insanity, because it states that the prisoner is incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings "by reason of his inability to communicate with and be communicated with by others." That finding distinguishes this case from *Reg.* v. *Berry* (4), where the jury did not find that as the reason why he was not capable of understanding the nature of the proceedings, and therefore the Court there came to the conclusion that the finding amounted to a finding of insanity. Moreover, in *Reg.* v. *Berry* (4) the prisoner was tried and convicted. Here the prisoner was not convicted, and there being no finding of

(1) (1787) 1 Leach, 451.
(2) 7 C. & P. 305, n.
(3) 7 C. & P. 303.
(4) 1 Q. B. D. 447.

1909

REX v. STAFFORD PRISON (GOVERNOR). EMERY, *Ex parte.*

insanity he is not in legal custody. The writ of habeas corpus ought therefore to issue for his discharge from prison.

LORD ALVERSTONE C.J. I am of opinion that the course of procedure adopted in this case and the order made by Channell J. are right. The jury were first sworn, when the prisoner stood mute upon his arraignment, to inquire whether he stood mute of malice or by the visitation of God. They found that he stood mute by the visitation of God. The jury were then sworn again to inquire whether the prisoner was capable of pleading to the indictment, and they found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others. I refer to this because, if the only finding is that the prisoner is mute by the visitation of God, he may be perfectly well able to defend himself, and a plea of not guilty should be entered by the Court and the trial should proceed in the ordinary way. Upon the above findings of the jury, Channell J. ordered him to be kept in custody until His Majesty's pleasure should be known. An application for a writ of habeas corpus was thereupon made, and the question which we have to consider is whether the order of the learned judge was rightly made.

It is contended on behalf of the prisoner that the order is bad upon the ground that no such order can be made under s. 2 of the Criminal Lunatics Act, 1800, unless there is a finding by the jury that the prisoner is insane, and that there is no such finding in the present case. I should be very sorry if we were compelled to adopt the argument that the finding here does not amount to a finding that the prisoner is not sane. It might work great injustice in many cases to put a prisoner against whom such a finding was recorded upon his trial as if he were perfectly sane, and if he was found guilty to punish him as an ordinary criminal; or it might be the cause of much mischief if he were found not guilty and were allowed to go free. I am glad to say that we are not driven to accept the argument. A practice has been established by judges of great authority over seventy years ago which has been followed ever since and which to my mind is in

accordance with reason and common sense. In *Rex* v. *Steel* (1) the prisoner was indicted at the Old Bailey for larceny, and upon being arraigned she stood mute. A jury, duly sworn to inquire whether she stood mute of malice or by the visitation of God, found that she stood mute by the visitation of God. There seems to have been some doubt raised as to the practice which should be adopted upon that finding, and the matter was referred to the judges, who were of opinion—and I have before me the original note of the resolution of the judges—that the finding that the prisoner was mute by the visitation of God was not an absolute bar to her being tried upon the indictment, and that a plea of not guilty should be entered for her. The prisoner was accordingly tried and convicted. That was in the year 1787, and the first question with regard to the trial was solved by the resolution of the judges, which is always recognized as a binding authority. Thirteen years later the Criminal Lunatics Act, 1800, was passed, s. 2 of which enacts that "if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment . . . . it shall be lawful for the Court before whom any such person shall be brought to be arraigned . . . . as aforesaid to direct such finding to be recorded, and thereupon to order such person to be kept in strict custody until His Majesty's pleasure shall be known." It is perfectly true that the words "inability to plead," "inability to understand the proceedings," and "inability to communicate with other persons" are not to be found in the Act. The only words are "shall be insane, and shall upon arraignment be found so to be . . . . so that such person cannot be tried upon such indictment." The question as to the proper direction to the jury upon the issue whether the prisoner was insane came before two very learned judges over seventy years ago at the assizes, and though the decision of a judge at the assizes is not binding upon us, I should be very unwilling to upset a practice which was laid down so long ago and has been followed ever since, and which seems to me to be reasonable. In *Rex* v. *Pritchard* (2) Alderson B. in

(1) 1 Leach, 451.

(2) 7 C. & P. 303.

1909

REX v. STAFFORD PRISON (GOVERNOR). EMERY, *Ex parte.*

Lord Alverstone C.J.

addressing the jury said: "There are three points to be inquired into:—First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence—to know that he might challenge any of you to whom he may object—and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation. Upon this issue, therefore, if you think that there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters. The case I have mentioned was considered by several of the judges, and they approved of the course adopted by Mr. Justice J. Parke." The case before Parke J. to which the learned judge referred was *Rex* v. *Dyson* (1), where Parke J., after referring to 1 Hale P.C., p. 34, directed the jury that "if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her, they ought to find her not sane." It is said that we ought not to follow those cases. It seems to me that when one looks at the words which follow the word "insane" in s. 2 of the Act of 1800—"so that such person cannot be tried upon such indictment"—we ought to construe the word "insane" with reference to the question whether the prisoner can or cannot be tried upon the indictment; and we ought not to say that Parke J. and Alderson B. and the other judges who considered the matter misdirected the jury as to the test of insanity for the purpose of this Act. I cannot find in any text-book which I have seen that any doubt has ever been thrown upon the view acted upon by those learned judges.

The question again arose in *Reg.* v. *Berry* (2), which came before the Court for Crown Cases Reserved. There a prisoner, whom a jury had found to be mute by the visitation of God, was tried upon an indictment for larceny, and the jury who tried

(1) 7 C. & P. 305, n. (2) 1 Q. B. D. 447.

him found that he was guilty, but that he was not capable of understanding, and as a fact had not understood, the nature of the proceedings. There was no question there of general insanity, but only of insanity from the point of view of not understanding the nature of the proceedings. The Court held that the prisoner ought not to have been convicted, and ordered him to be kept in custody under s. 2 of the Act of 1800 until Her Majesty's pleasure should be known, upon the ground that owing to a defect in his faculties he had not intelligence enough to understand the nature of the proceedings against him and was therefore not sane. Lush J. said, speaking of a person being of non-sane mind, "I understand the finding of the jury, that the prisoner was not capable of understanding, and as a fact had not understood, the nature of the proceedings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings." The Court thereupon quashed the conviction. Counsel for the prisoner then took the point that there was no finding of the jury upon which the prisoner could be remitted to gaol under the statute, to which Kelly C.B. replied, "Yes; for they have actually found that he is not capable of understanding, and has not understood, the nature of the proceedings; which, in point of law, amounts to a finding of insanity." That is a decision which approved of and adopted the view of the law taken by Parke J. and Alderson B. years before; and, following and adopting those decisions, I think that Channell J. in the present case laid down the right test of insanity for the purpose of the Act of 1800 and rightly made an order for the prisoner's detention during His Majesty's pleasure. The order nisi must therefore be discharged.

DARLING J. I am of the same opinion. The jury first found that the prisoner stood mute by the visitation of God; and in the second place they found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with others and to be communicated with by them. The Court thereupon ordered him to be kept in custody until His Majesty's pleasure should be known. It is contended that

1909

REX v. STAFFORD PRISON (GOVERNOR). EMERY, *Ex parte.*

Darling J.

the prisoner has not been found to be insane, and that therefore there is no jurisdiction to order him to be detained in custody. It seems to me that the finding of the jury amounts to a finding that the prisoner is non-sane so as to give the Court jurisdiction to act under s. 2 of the Criminal Lunatics Act, 1800. It is not merely a finding that he stands mute by the visitation of God, and that he cannot communicate with others, though he can understand all that is being done, but it is a distinct finding that he is incapable of understanding and following the proceedings and of making his own view, if any, known. It is not a case in which there is an absence of any finding that the prisoner was incapable of understanding the proceedings. It seems to me that there is a sufficient finding to bring the case within the decisions to which my Lord has referred, and the order of the learned judge was right.

JELF J. agreed.

Order discharged.

Solicitor for applicant: *The Official Solicitor.*
Solicitor for respondent: *Solicitor to the Treasury.*

W. F. B.

MATTHEWS, Appellant *v.* GRAY, Respondent. 1909 *March* 30.

Pistol—Sale—Conditions—For use by Purchaser in his House—Reasonable Proof—Statement signed by Inspector of Police or Justice of the Peace—Pistols Act, 1903 (3 *Edw.* 7, *c.* 18), *s.* 3.

On the sale of a pistol to a person who being a householder purposes to use such pistol only in his own house or the curtilage thereof it is necessary under s. 3 of the Pistols Act, 1903, not only that reasonable proof of these facts shall be given to the vendor, but also that the intending purchaser shall produce to the vendor a statement to that effect signed by himself and either by a police officer or a justice of the peace.

Case stated by a metropolitan magistrate.

An information was laid by the appellant under the Pistols Act, 1903 (3 Edw. 7, c. 18), s. 3(1), against the respondent for that he on September 19, 1908, did unlawfully sell by retail to a certain person, to wit, William Garton, a pistol, such person not producing at the time of the sale a gun or game licence then in force, nor giving reasonable proof that he was a person entitled to use or carry a gun without a gun or game licence by virtue of s. 7 of the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), or that being a householder he purposed using the said pistol only in his own house or the curtilage thereof, and producing a statement to that effect signed by himself, the said William Garton, and a police officer of the district of not lower rank than an inspector.

Upon the hearing of the information the following facts were either proved or admitted. The respondent, who was a manager to Messrs. Cogswell & Harrison, gunmakers, on September 19,

(1) Pistols Act, 1903 (3 Edw. 7, c. 18), s. 3: "It shall be unlawful to sell by retail or by auction or let on hire a pistol to any person, unless at the time of sale or hire such person either produces a gun or game licence then in force, or gives reasonable proof that he is a person entitled to use or carry a gun without a gun or game licence by virtue of section 7 of the Gun Licence Act, 1870, or that, being a householder, he purposes to use such pistol only in his own house or the curtilage thereof, or that he is about to proceed abroad for a period of not less than six months, and produces a statement to that effect, signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace."

1909

MATTHEWS v. GRAY.

1908, sold to William Garton a revolver, the same being a pistol within the meaning of the Pistols Act, 1903. Before selling the pistol the respondent was given reasonable proof by Garton that he was a householder and purposed to use the pistol only in his own house or the curtilage thereof. The respondent took every possible care in making inquiries into the statements of Garton, and became thereby satisfied of their truth before the pistol was so sold. No statement signed by Garton and by a police officer of the district of rank not lower than that of an inspector, or by Garton and a justice of the peace, was produced to the respondent at the time of the sale of the pistol or at any other time. The respondent alleged that, if he was satisfied that the purchaser was a householder and intended to use the pistol only as above mentioned, it was not his practice to require any signed statement, nor, so far as he knew, the practice of other gunmakers.

On the part of the appellant it was contended that upon the true construction of the Pistols Act, 1903, where the purchase was by a person claiming to be a householder who purposed to use the pistol only in his own house or the curtilage thereof, it was necessary not only that such purchaser should give reasonable proof that he was a householder purposing to use the pistol as aforesaid, but also that before the sale was effected he should produce a statement signed by him and by an inspector of police or by a justice of the peace to the seller, containing a statement to that effect, and whereas no such statement had been produced to the respondent by Garton, the offence had been committed by the respondent against the statute.

It was contended on behalf of the respondent that upon the true construction of s. 3 of the Pistols Act, 1903, no signed statement was necessary in the case of a purchaser giving reasonable proof of being a householder purposing to use a pistol in his own house or the curtilage thereof, the section only requiring the signed statement in the case of a purchaser stating himself to be a person about to proceed abroad for a period of not less than six months.

The magistrate was of opinion that the contention of the respondent was correct, and accordingly he dismissed the information.

The question for the opinion of the Court was whether the magistrate upon the above facts came to a correct determination in point of law.

Danckwerts, *K.C.*, and *Bodkin*, for the appellant. The respondent should have been convicted. Under s. 3 of the Pistols Act, 1903, purchasers of pistols are divided into two classes, the first being persons who produce either a gun or a game licence, in which case the sale may be made without any further formality. The second category includes three different classes of persons, namely, persons who may use or carry a gun without a gun or game licence under s. 7 of the Gun Licence Act, 1870, householders purchasing a pistol for use in their houses, and persons about to proceed abroad. In each of these three cases it is necessary that the intending purchaser, in addition to giving reasonable proof that he comes within one of the three classes, shall produce a statement to that effect signed by himself and either an inspector of police or a justice of the peace. The distinction between the two categories is that in the first the gun or game licence is itself the necessary documentary evidence, whereas in the three cases in the second category there would be no documentary evidence. There is no reason why the signed statement should be required only in the case of a purchaser who is about to go abroad.

B. Lailey (*Lush*, *K.C.*, with him), for the respondent. The decision of the magistrate was right. In the case of a person entitled to use or carry a gun without a licence, and of a householder purposing to use a pistol in his own house only, reasonable proof of those facts must be given. The signed statement need only be given where the purchaser is about to proceed abroad. That is the grammatical reading of the section. If the construction contended for on behalf of the appellant is correct, either the word "respectively" would have been used in the last sentence, or that sentence would have preceded the description of the three classes of persons to whom it was intended to apply. It is difficult to understand why both reasonable proof of certain facts and the production of a signed statement to the same effect should be necessary. It is intelligible that a police

1909

MATTHEWS v. GRAY.

inspector or a justice of the peace could sign a statement to the effect that a certain person was about to go abroad, but a statement to the effect that a person purposed to use a pistol only in his own house would be of very little value.

Danckwerts, K.C., in reply.

DARLING J. I am of opinion that this appeal must be allowed. The section is certainly very obscure, and, speaking for myself, I desire to say that there is great force in the argument urged on behalf of the respondent, which was adopted by the magistrate in giving his decision; but I think that sense is best made of the section, indeed is only thoroughly made, if the section is divided into two main heads, of which the second is further divided into three sub-heads. The section then reads "It shall be unlawful to sell by retail or by auction or let on hire a pistol to any person, unless at the time of sale or hire such person either produces a gun or game licence then in force"; that is one head. Then the section proceeds with the second head, "or gives reasonable proof" of the matters contained in the three sub-heads, which are (*a*) "that he is a person entitled to use or carry a gun without a gun or game licence by virtue of section 7 of the Gun Licence Act, 1870," (*b*) "or that, being a householder, he purposes to use such pistol only in his own house or the curtilage thereof," (*c*) "or that he is about to proceed abroad for a period of not less than six months." So far the section reads perfectly plainly, but the following words give rise to the difficulty, "and produces a statement to that effect, signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace." I read those last words as if they were inserted at the end of each of the sub-heads which I have called *a*, *b*, and *c*. I cannot myself see that this statement, signed by a police inspector or by a justice of the peace, could be made any more definitely as to the fact of its being the purchaser's intention to go abroad for a period of not less than six months than it could be as to the facts mentioned in the two preceding paragraphs, and I think that the intention of the Legislature was that the signed statement should be produced if the purchaser came within either

1909

MATTHEWS v. GRAY.

Darling J.

of the three sub-heads *a*, *b*, or *c*. It is no doubt somewhat singular that a person who has already given reasonable proof of certain facts should also be required to produce a signed statement to the same effect, but that argument would equally apply if the provision as to the signed statement were confined, as suggested on behalf of the respondent, to the case of the purchaser who was intending to go abroad.

JELF J. I am of the same opinion. I think that the judgment delivered by Darling J. is the correct one to apply to the section.

Appeal allowed.

Solicitors for appellant: *Wontners.*

Solicitors for respondent: *Mackrell & Ward.*

F. O. R.

HAWKE, APPELLANT *v.* E. HULTON & CO., LIMITED, RESPONDENTS.

1909

March 30.

Lottery—Offence—Corporation—"Person"—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *ss.* 41, 67—*Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), *s.* 2, *sub-s.* 1.

The Lotteries Act, 1823, s. 41, enacts that if any person shall publish any proposal or scheme for the sale of chances in a lottery, not authorized by Act of Parliament, such person shall for every such offence be deemed a rogue and vagabond, and shall be punished as such in the manner thereinafter directed. By s. 67 the punishment is imprisonment, and for a second offence imprisonment and whipping. By s. 4 of the Summary Jurisdiction Act, 1879, a fine may be imposed instead of imprisonment:—

Held, that a joint stock company incorporated under the Companies Acts cannot be convicted of an offence under s. 41.

CASE stated by the stipendiary magistrate of Manchester.

An information was preferred by the appellant under 4 Geo. 4, c. 60, against the respondents for that they on June 3, 1908, in the city of Manchester, did unlawfully publish a proposal and scheme for the sale of chances in a certain lottery not authorized by any Act of Parliament, to wit, a lottery known

1909

HAWKE v. E. HULTON & Co., LIMITED.

as "*Ideas* Limericks," contrary to the form of the statute in that case made and provided.

At the hearing of a summons issued in pursuance of the information the following facts were proved or admitted. The appellant was the honorary secretary of the National Anti-Gambling League. The respondents were newspaper proprietors, publishers, letterpress printers, bookbinders, and engravers, carrying on business at a building, No. 2, Mark Lane, situate and being at the corner of Mark Lane and Withy Grove, in the city of Manchester, and were the proprietors of a weekly paper called *Ideas*. The respondents were a company limited by shares and incorporated under the Companies Acts on December 5, 1898, and the registered office of the respondent company was 2, Mark Lane, Withy Grove, Manchester. The respondent company was the person rated as occupier of the premises at 2, Mark Lane, Withy Grove, Manchester. Evidence was given by the appellant with the view of proving that the respondents on June 3, 1908, offered in the paper *Ideas* certain prizes in connection with a competition called or known as "Limericks," that the competition was a lottery not authorized by any Act of Parliament, and that the offer of prizes was a proposal and scheme for the sale of chances in a lottery not authorized by any Act of Parliament, and that consequently the respondents had committed an offence against 4 Geo. 4, c. 60, s. 41. (1) For

(1) Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41: "And be it further enacted, that if any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorized by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorized by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorized as aforesaid, ... such person or persons shall for every such offence forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed: . . . ."

By s. 67 the punishment is imprisonment for not more than six months and not less than one month; and in the case of a second conviction the offender may, in addition to being imprisoned, be whipped.

the reasons hereinafter mentioned the magistrate gave no decision and expressed no opinion upon such evidence.

At the close of the evidence given by the appellant it was contended by the respondents by way of preliminary objection that, even assuming the evidence given proved a publication by the respondents of a proposal and scheme for the sale of chances in a lottery, which, however, they did not admit, the respondents, being a company limited by shares incorporated under the Companies Acts, could not be convicted as rogues and vagabonds under 4 Geo. 4, c. 60, s. 41. The appellant contended that under and by virtue of the Interpretation Act, 1889, s. 2, sub-s. 1 (1), the respondents could be so convicted.

The magistrate was of opinion that the respondents, being a corporation, could not be convicted as rogues and vagabonds under the statute on the ground that, the statute having provided that persons convicted under it of the offence alleged in the above-mentioned information should be deemed to be rogues and vagabonds and punished with imprisonment as such, a "contrary intention" appeared within the meaning of s. 2, sub-s. 1, of the Interpretation Act, 1889, and that the word "person" in s. 41 of 4 Geo. 4, c. 60, meant a natural person and not a corporation. The magistrate accordingly dismissed the summons.

The question of law for the consideration of the Court was whether the respondents, being a body corporate, could be convicted as rogues and vagabonds under 4 Geo. 4, c. 60.

R. Nevill, for the appellant. The word "person" in s. 41 of the Lotteries Act, 1823, must be construed as including a corporation, unless in the words of s. 2, sub-s. 1, of the Interpretation Act, 1889, "the contrary intention appears." The intention of the Act was to prohibit lotteries, and since a lottery can be carried on by a corporation just as easily as by an

(1) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 2, sub-s. 1: "In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate."

1909.

HAWKE v. E. HULTON & Co., LIMITED.

individual, it cannot be contrary to the intention of the Act that a corporation which has offered prizes in connection with a lottery should be convicted and punished for so doing. It is true that, as at the time the Act of 1823 was passed there was no power to inflict a fine as an alternative punishment to imprisonment, it might have been contended that the impossibility of imprisoning a corporation was evidence of the contrary intention; but that difficulty no longer exists, for by s. 4 of the Summary Jurisdiction Act, 1879 (1), an offence under s. 41 of the Lotteries Act, 1823, can now be punished by fine instead of imprisonment. [He referred to *Pearks* v. *Ward* (2) and *Cornford* v. *Carlton Bank*. (3)]

Gordon Hewart (*Lush, K.C.*, with him), for the respondents. This case would be unarguable but for s. 4 of the Summary Jurisdiction Act, 1879, and that section does not really help the appellant. It only enables a magistrate to impose a fine instead of a term of imprisonment if he thinks that the justice of the case will be better met by so doing; but if the contention of the appellant is right, a magistrate would in the case of a corporation convicted of an offence under s. 41 of the Lotteries Act, 1823, have no alternative but to impose a fine, although he might be of opinion that the justice of the case required a sentence of imprisonment.

[He was stopped.]

DARLING J. The question in this case comes before us on a case stated by the stipendiary magistrate of Manchester. The

(1) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 4: ". . . . And where a Court of summary jurisdiction has authority under an Act of Parliament other than this Act, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has not authority to impose a fine for that offence, that Court when adjudicating on such offence may, notwithstanding, if the Court think that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding twenty-five pounds, and not being of such an amount as will subject the offender under the provisions of this Act, in default of payment of the fine, to any greater term of imprisonment than that to which he is liable under the Act authorizing the said imprisonment."

(2) [1902] 2 K. B. 1.

(3) [1900] 1 Q. B. 22.

1909

HAWKE v. E. HULTON & Co., LIMITED.

Darling J.

respondents, who are newspaper proprietors and a limited company, were proceeded against by summons in respect of an offence which they were alleged to have committed against s. 41 of the Lotteries Act, 1823. That section provides that persons shall not publish any proposal or scheme for the sale of tickets, &c., in any lottery except such as are authorized by the State; and it also provides that if any one does that he shall for every such offence forfeit and pay the sum of 50*l.*, and shall also be deemed to be a rogue and vagabond and shall be punished as such in the manner thereinafter directed. Then s. 67 provides that persons convicted of such an offence and adjudged rogues and vagabonds shall be imprisoned for a period not exceeding six calendar months. Under that statute, as it was passed, if this company could be convicted, the proper and, indeed, the only punishment would be imprisonment; but then comes the Summary Jurisdiction Act, 1879, s. 4 of which provides that "where a Court of summary jurisdiction has authority under an Act of Parliament other than this Act, whether past or future, to impose imprisonment for an offence punishable on summary conviction, and has not authority to impose a fine for that offence, that Court . . . . may, notwithstanding, if the Court think that the justice of the case will be better met by a fine than by imprisonment, impose a fine not exceeding 25*l.*, and not being of such an amount as will subject the offender . . . . in default of payment of the fine to any greater term of imprisonment than that to which he is liable under the Act authorizing the said imprisonment." But the magistrate is not bound to impose a fine, and the section does not say that in a particular class of offence a fine shall be imposed and that in another class imprisonment shall be inflicted. It is, however, said that these proceedings may be taken because of the provisions of s. 2 of the Interpretation Act, 1889. That section says, "In the construction of every enactment relating to an offence . . . . whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall, unless the contrary intention appears, include a body corporate." It is perfectly plain that the word "person" as used in the Lotteries Act, 1823, might thus include a body

1909

HAWKE v. E. HULTON & Co., LIMITED.

Darling J.

corporate, unless a contrary intention appears. The question therefore is, Does a contrary intention appear? The intention must be contrary to the supposition that a limited company may be imprisoned, or fined if the magistrate thinks that imprisonment is not an appropriate punishment. The question is mainly one of interpretation, and I have come to the conclusion that a contrary intention does appear. In my view the words "rogue and vagabond" are wholly inappropriate as applied to a limited company. When the Act of George IV. was passed the words "rogue and vagabond" meant something definite, and certainly did not mean a limited company. The Interpretation Act, 1889, does not say that the word "person" shall always include corporations. In my opinion the word "person" in the Lotteries Act, 1823, does not include a limited company in the sense that a limited company is liable to be brought before any two or more justices of the peace and adjudged rogues and vagabonds. I think the judgment of Channell J. in the case of *Pearks* v. *Ward* (1) shews that the statute may be looked at to see whether with regard to one part of it the word "person" may not appropriately be applied to a limited company or corporation, and it does not follow because the word "person" is inapplicable to a limited company in one part of the section it may not be applicable to another part. We are only asked to say whether this company can be convicted before a magistrate upon a summons under s. 41 and punished as rogues and vagabonds. I have come to the conclusion that they cannot be so convicted.

But there is another part of the statute as to which I am by no means certain that the company could not be proceeded against. Sect. 41 says that "such person or persons shall for every such offence forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond or rogues and vagabonds and shall be punished as such." If a person is to be convicted as a rogue and vagabond the procedure under s. 67 must be followed, but if it is intended to proceed for the 50*l.* penalty the proceedings must be under s. 62. That section provides that all pecuniary penalties for any offence against the Act shall, when

(1) [1902] 2 K. B. 1.

recovered, "go and be applied to the use of His Majesty, his heirs or successors," and the action, suit, bill, plaint, or information shall be commenced in the name of the Attorney-General. I desire particularly to say that although I decide for my own part that the proceedings to have the respondents adjudged rogues and vagabonds were not open to the appellant here, because in my judgment the Lotteries Act expresses a contrary intention, my decision goes no further than this, that it is only that part of the statute which relates to the punishment of being adjudged rogues and vagabonds which expresses the contrary intention. It is not necessary for us to decide the question whether proceedings could be taken by the Attorney-General against a company under s. 62 for the recovery of the penalty provided by s. 41, and that question has not been argued, but I desire to guard against its being supposed that our decision in this case in any way decides that proceedings could not be taken against a corporation under s. 62 for the recovery of a penalty. For these reasons I am of opinion that the decision of the magistrate was right.

JELF J. I am of the same opinion and I concur entirely in the judgment of my brother Darling and in the reasons which he has so clearly expressed. I only desire to add that I can see no reason why it should not be legally possible to convict a company of the offence of keeping a lottery. A company has the power to do these things which are a public mischief with even greater facility than an individual, but I do not think that at present it is possible to convict a company under s. 41 of the Lotteries Act, 1823.

Appeal dismissed.

Solicitors for appellant: *Malkin & Co.*

Solicitors for respondents: *R. B. Wheatley, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

F. O. R.

1909
April 3.

MILCH *v.* FRANKAU & CO.

Mayor's Court—Practice—Notice of Appeal—Time within which Notice must be served—Service on Sunday—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *s.* 6—*Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8.

By s. 8 of the Mayor's Court of London Procedure Act, 1857, notice of appeal from the determination or direction of the Court in point of law or upon the admission or rejection of any evidence shall be given "within two days after such determination or direction":—

Held, that if the period of two days expires on a Sunday the notice of appeal may be given on the following Monday.

Reg. v. *Middlesex Justices*, (1848) 17 L. J. (M.C.) 111, followed.

Preliminary objection to the hearing of an appeal by the defendants Frankau & Co. from a verdict and judgment given in the Mayor's Court, London.

The action was brought to recover (inter alia) damages for wrongful dismissal, and the trial took place on Friday, November 20, 1908, before the Recorder and a jury, when the jury by their verdict awarded 21*l.* damages to the plaintiff and an account of commission due to him on orders received by the defendants, and the Recorder directed judgment to be entered for him accordingly.

The defendants moved to set aside the verdict and judgment upon the ground (inter alia) of misdirection. At the trial leave to appeal was not asked for. The notice of appeal was not served till Monday, November 23, 1908.

J. B. Matthews, for the plaintiff. There is a preliminary objection to the hearing of the appeal. Sect. 8 of the Mayor's Court of London Procedure Act, 1857 (1), under which the

(1) Mayor's Court of London Procedure Act, 1857, s. 8: "If either party appearing on the trial of any cause in which the sum sought to be recovered shall exceed the sum of 20*l.* shall be dissatisfied with the determination or direction of the Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any one of the superior Courts . . . . provided that such party shall, within two days after such determination or direction, give notice of appeal to the other party or his attorney, and also give security

appeal is brought, requires notice of appeal to be given within two days after the hearing in the Mayor's Court. The appeal does not lie under s. 10 of the Act of 1857, as leave to appeal was not asked for at the trial. As the second day from the trial was Sunday, November 22, notice of appeal ought to have been given on Saturday, November 21, and not on Monday, November 23. Where by a statute an act has to be done within a certain period, and the last day of the period falls on a Sunday, the act must be done not later than the preceding Saturday: *Peacock* v. *Reg.* (1); *Rowberry* v. *Morgan* (2); *Ex parte Simpkin.* (3) An exception is where the act has to be done on the next day after an event. If the next day after the event is Sunday and the statute therefore cannot be complied with, the act may be done on the following Monday. Another exception is introduced in the Rules of the Supreme Court, 1883, by Order LXIV., r. 3. There is no jurisdiction to dispense with the conditions as to appealing imposed by s. 8 of the Mayor's Court of London Procedure Act, 1857: *Kirby* v. *North British and Mercantile Insurance Co.* (4) [The Mayor's Court of London Procedure Act, 1857, s. 9, *Eder* v. *Levy* (5), and the Rules of the Supreme Court, 1883, Order LIX., r. 16, were also referred to.]

A. M. Latter, for the defendants. There is no rule of law that if an act is to be done within a certain period, the last day of which falls on a Sunday, the act must be done not later than the

---

within such time or times as the Court shall direct, to be approved of by the registrar of the Court (if the judge shall so direct), for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant, and the appeal be dismissed: provided nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the registrar, and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial on such terms as it shall think fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper, and such orders shall be final."

(1) (1858) 4 C. B. (N.S.) 264.

(2) (1854) 9 Exch. 730.

(3) (1859) 2 E. & E. 392.

(4) [1896] 2 Q. B. 99.

(5) (1887) 19 Q. B. D. 210.

1909

MILCH v. FRANKAU & Co.

preceding Saturday. A notice of appeal is "process" within the meaning of s. 6 of the Sunday Observance Act, 1677. It is therefore illegal to serve it on Sunday, and the decision in *Reg.* v. *Middlesex Justices* (1) shews that where any process within the meaning of the Act of 1677 has to be served within a certain time, inasmuch as it is illegal to serve it on Sunday, that day is to be excluded in the computation of the time. In *Reg.* v. *Middlesex Justices* (2) the point that service of notice of appeal on Sunday is illegal under the Sunday Observance Act, 1677, was not taken in the argument in support of the validity of the service of the notice. The authorities cited on behalf of the plaintiff are not in point, as no decision was given with regard to the effect of the Act of 1677. [Stroud's Judicial Dictionary, vol. 1, 2nd ed. p. 462, *Brown* v. *Johnson* (3), *Mumford* v. *Hitchcocks* (4), and *Morris* v. *Barrett* (5) were also referred to.]

Matthews, in reply. *Reg.* v. *Middlesex Justices* (1) is distinguishable. The decision of the justices in that case was given on Saturday, possibly so late that, as the notice of appeal had to be given within twenty-four hours, there was no time left for it being given on the Saturday. In the present case a day on which the particular act could be done intervened before the Sunday. It is immaterial whether performance of an act on Sunday is made illegal by statute or is in fact impossible. The act must be done on the previous Saturday if it is possible to do it. *Rowberry* v. *Morgan* (6) is in the plaintiff's favour. In that case the act to be done was within the prohibition contained in the Sunday Observance Act, 1677.

WALTON J. I am of opinion that the notice of appeal was in time. I quite agree that the general rule is stated in *Ex parte Simpkin* (7), where it was very shortly put by Blackburn J. thus: "I see no reason to differ from the principle laid down by the Court of Exchequer in *Rowberry* v. *Morgan* (6), that we must adhere to the plain meaning of the Act in every case, and hold

(1) 17 L. J. (M.C.) 111.
(2) (1843) 12 L. J. (M.C.) 59.
(3) (1842) 10 M. & W. 331.
(4) (1863) 14 C. B. (N.S.) 361.
(5) (1859) 29 L. J. (C.P.) 102.
(6) 9 Exch. 730.
(7) 2 E. & E. 392.

that Sunday is to be included in the computation of the number of days, if nothing is said about its exclusion." But there are some exceptions to the general rule as thus laid down, because it was held in *Hughes* v. *Griffiths* (1) that "in the computation of time, where the last day falls on a Sunday or holiday, and the act is to be done by the Court, and not by the party—e.g., the sealing of a writ—it may be done on the next practicable day." That was also the effect of the decision in *Mumford* v. *Hitchcocks*. (2) Another exception to the general rule has been laid down in *Reg.* v. *Middlesex Justices* (3), in which it was held that Sunday was to be excluded in computing the twenty-four hours within which the putative father has to give notice of appeal against an order of affiliation under the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 4. In that case the contention was that s. 6 of the Sunday Observance Act, 1677, prohibited the giving notice of appeal on Sunday, and that therefore that day ought not to count in computing the twenty-four hours. The words of s. 6 of the Act of 1677 are "No person or persons upon the Lord's Day shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree." It was contended that service of the notice was service of process within that section, and that therefore Sunday ought to be excluded. In delivering judgment Erle J. said: "I am also of opinion that the notice of appeal would come within the meaning of the word 'process' in the statute of Charles. It is a notice of what one Court has decided, and it authorizes another Court to take further proceedings. It is therefore in the nature of process; and by analogy to the cases as to declarations in ejectment and other proceedings inter partes it cannot be served on Sunday." In that case, therefore, the Court held that Sunday ought to be excluded in the computation of time where the performance of the act on Sunday is prohibited. In the present case the act to be done is the service of the notice of appeal, an act exactly in the same category as that in *Reg.* v. *Middlesex Justices*. (3) We are bound by that decision to hold that the present case is not within the general rule stated

(1) (1862) 13 C. B. (N.S.) 324. (2) 14 C. B. (N.S.) 361.
(3) 17 L. J. (M.C.) 111.

1909

MILCH v. FRANKAU & CO.

by Blackburn J. in *Ex parte Simpkin* (1), and that the notice of appeal was in time.

JELF J. I am of the same opinion.

Preliminary objection overruled.

Solicitors for plaintiff: *Nordon & Drury.*
Solicitors for defendants: *Wild & Collins.*

J. E. A.

1909
March 25.

DAVIES, APPELLANT *v.* HARRISON, RESPONDENT.

Licensing Acts—Six-day Licence—Premises to be closed "during the whole of Sunday"—Christmas Day and Good Friday—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 49—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 3.

By s. 49 of the Licensing Act, 1872, the holder of a six-day licence "shall keep his premises closed during the whole of Sunday." By s. 3 of the Licensing Act, 1874, which regulates the hours of closing of licensed premises generally, "such premises wherever situate shall be closed on Christmas Day and Good Friday . . . . as if Christmas Day and Good Friday were respectively Sunday":—

Held, that the holder of a six-day licence is not bound to close his licensed premises during the whole of Christmas Day when it falls on a day other than a Sunday, but is only bound to close on that day during the hours of closing applicable to licensed premises generally.

CASE stated by justices for the city of Gloucester.

An information was preferred by the respondent, the deputy chief constable for the city of Gloucester, against the appellant for that he the appellant, being a licensed person for the sale of intoxicating liquors by retail in his premises, did unlawfully open his licensed premises for the sale of intoxicating liquor during the time that his licensed premises were required to be closed by and in pursuance of the Licensing Act, 1874, to wit, at 6.50 o'clock in the evening of Christmas Day, 1908.

Upon the hearing of the information the following facts were proved:—

The appellant, being the holder of a six-day licence for the

(1) 2 E. & E. 392.

sale of intoxicating liquors by retail in his premises, opened his licensed premises for the sale of intoxicating liquor at 6.50 o'clock in the evening of Christmas Day, December 25, 1908, which was a Friday.

On the part of the appellant it was admitted that it was only when Christmas Day fell on a day other than a Sunday that the holder of a six-day licence could open his licensed premises on that day, and then only during the same hours as on a Sunday.

It was contended on behalf of the appellant that no offence had been committed. A six-day licence was created by s. 49 of the Licensing Act, 1872 (1), and was granted to a licensee on his

(1) Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 49: "Where on the occasion of an application for a new licence or transfer or renewal of a licence which authorizes the sale of any intoxicating liquor for consumption on the premises, the applicant, at the time of his application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence.

"The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday . . . . . The holder of a six-day licence may obtain from the Commissioners of Inland Revenue any licence granted by such Commissioners, which he is entitled to obtain in pursuance of such six-day licence, upon payment of six seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence . . . ."

Licensing Act, 1874 (37 & 38 Vict. c. 49), s. 3, is the first of a group of sections under the heading "Hours of Closing," and prescribes the hours during which licensed premises are to be closed on weekdays and on Sundays, the hours, so far as material to this case, being on Saturday night from 11 P.M. until 12.30 P.M. on Sunday, from 2.30 P.M. to 6 P.M. on Sunday, and from 10 P.M. on Sunday until 6 A.M. on the following day. The section further provides that "such premises wherever situate shall be closed on Christmas Day and Good Friday, and on the days preceding Christmas Day and Good Friday respectively, as if Christmas Day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday, but this provision shall not alter the hours during which such premises shall be closed on Sunday when Christmas Day immediately precedes or succeeds Sunday."

Sect. 9 imposes a penalty on a person who, during the time at which premises for the sale of intoxicating liquors are directed to be closed, opens or keeps open such premises for the sale of intoxicating liquor.

1909

DAVIES v. HARRISON.

own application, special provision being made by it that his premises should be closed during the whole of Sunday, and there was no definition of the word "Sunday" in that Act, nor did s. 49 of the Act say anything about Christmas Day and Good Friday; and therefore under the ordinary law the word "Sunday" must be construed to mean the first day of the week, the Lord's Day, and not to include Christmas Day and Good Friday. Sect. 3 of the Licensing Act, 1874, which provided that licensed premises should be closed on Christmas Day and Good Friday as if those days were Sundays, did not convert Christmas Day or Good Friday into Sunday, but merely dealt with the hours of closing on those days; and as a six-day licence holder paid six sevenths of the ordinary excise licence duty, there was a remission of one seventh of the excise licence duty, and if Christmas Day and Good Friday were converted into Sundays so that a six-day licensee could not open his licensed premises at all on those days, there would have been a further remission of excise licence duty provided by the Act of 1874.

It was contended on behalf of the respondent that, as by s. 1 of the Licensing Act, 1874, that Act and the Licensing Act, 1872, were, so far as was consistent with the respective tenors of the Acts, to be construed as one Act, s. 3 of the Act of 1874, taken together with s. 49 of the Act of 1872, made it clear that six-day licensed premises had to be closed on Christmas Day and Good Friday; and that if it was held that the appellant was entitled to open his premises on Christmas Day, then he had got for his six sevenths of the excise licence duty a greater benefit than the person who paid the full duty, as there was nothing in the Act to say that a six-day licensee was to close his premises during the hours when other licensed premises were closed on Sundays, and the appellant could therefore open his premises all day on Christmas Day when it fell on any day other than a Sunday. The case of *Forsdike* v. *Colquhoun* (1) was referred to.

The majority of the justices were of opinion that the Legislature intended Christmas Day to be regarded as a Sunday, and that the appellant as a six-day licensee was not entitled to open his licensed premises for the sale of intoxicating liquor on

(1) (1883) 11 Q. B. D. 71.

Christmas Day. They accordingly fined the appellant 1*s.* and 7*s.* costs.

1909

DAVIES v. HARRISON.

The question for the opinion of the Court was whether the decision was right in law.

Cranstoun, for the appellant. Sect. 49 of the Licensing Act, 1872, under which a six-day licence is granted, directs that the holder of such a licence shall keep his licensed premises closed during the whole of Sunday. That Act and the Licensing Act, 1874, are, by s. 1 of the latter Act, to be construed as one Act so far as is consistent with the respective tenors of the Acts. Sect. 3 of the Act of 1874, which superseded s. 24 of the earlier Act, regulates the hours during which all licensed premises, including six-day licensed premises where those provisions are applicable, must be kept closed, and then the section proceeds to enact that such premises shall be closed on Christmas Day and Good Friday "as if Christmas Day and Good Friday were respectively Sunday"; and s. 10 prohibits a six-day licence holder from selling liquor to any person not lodging in his house, even to a bona fide traveller, on Sunday. Sect. 3 does not convert Christmas Day and Good Friday into Sunday for the purpose of a six-day licence. It only deals with the hours of closing generally, and when Christmas Day falls on a day other than a Sunday the hours of closing are to be the same as on a Sunday. Therefore a six-day licence holder is not bound to close his licensed premises on Christmas Day when it falls on a day other than a Sunday, though he is bound to keep his premises closed during the ordinary hours of closing on such a day. It would be unfair to construe the Act so as to compel a six-day licence holder, who gets a remission of the excise duty in respect of one day in the week during which his premises are closed, to close on Christmas Day and Good Friday as well as on Sunday. The decision in *Forsdike* v. *Colquhoun* (1) is in point. In that case it was held that the word "Sunday" in the Sunday Closing (Wales) Act, 1881, does not include Christmas Day, unless it falls on a Sunday, or Good Friday. North J. said (2) that "a second point has been ingeniously argued that the

(1) 11 Q. B. D. 71. (2) Ibid. at p. 73.

1909

DAVIES v. HARRISON.

3rd section of the Act of 1874, taken in connection with the 49th section of the Act of 1872, makes Christmas Day and Good Friday follow the rule as to Sunday. But I think the words at the end of the 3rd section, on which so much reliance has been properly placed, simply have the effect of defining the hours during which licensed houses may be opened on those days." The appellant therefore did not commit an offence by opening his licensed premises on Christmas Day.

H. M. Sturges, for the respondent. By s. 3 of the Licensing Act, 1874, licensed premises are to be closed on Christmas Day as if Christmas Day was Sunday. As that Act and the Licensing Act, 1872, are to be construed as one Act, Christmas Day is to be treated as a Sunday for the purpose of the premises in respect of which a six-day licence is granted being closed; and by s. 49 of the earlier Act "the provisions of this Act"—which now include the provisions of the two Acts—"with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only." Therefore, Christmas Day being treated as a Sunday for the purpose of closing hours, s. 49 requires, in the case of a six-day licence, the premises to be closed during the whole of that day. If the appellant's contention is right, then the words "except in the case of a six-day licence" would have to be read into s. 3 of the Act of 1874 after the words "as if Christmas Day and Good Friday were respectively Sunday." In *Forsdike* v. *Colquhoun* (1) Pollock B. thought that if the Sunday Closing (Wales) Act, 1881, had been directed to be read together with the Licensing Acts, 1872 and 1874, the word "Sunday" in the Act of 1881 might have included Christmas Day and Good Friday. That case, therefore, is distinguishable, and the observation of North J. relied upon by the appellant was only a dictum not necessary for the decision of the Court. The decision of the justices was therefore right.

LORD ALVERSTONE C.J. In my opinion the view taken by the majority of the justices was wrong, and I can state very shortly

(1) 11 Q. B. D. 71.

1909

DAVIES v. HARRISON.

Lord Alverstone C.J.

the reasons which have led me to come to that conclusion. An applicant who is granted a six-day licence under s. 49 of the Licensing Act, 1872, is required to keep his licensed premises closed during the whole of Sunday, and if he sells any intoxicating liquor on a Sunday he shall be deemed to be selling it without a licence; in other words, he will be committing a criminal offence. I decline to read the word "Sunday" in that section as including some other day besides Sunday unless I am bound to do so by some other enactment. It is said that s. 3 of the Licensing Act, 1874, compels me to place that construction upon s. 49 of the earlier Act. In order to see whether that is so we must ascertain the subject-matter upon which Parliament was legislating when it enacted s. 3 of the Act of 1874. Parliament was obviously legislating about the hours of closing. The section comes under the heading "Hours of Closing," and it begins by enacting that "all premises in which intoxicating liquors are sold by retail shall be closed as follows." The section then deals with the hours of closing in the metropolitan district and in other districts on the various days of the week including Sunday, and in the last clause, upon which the respondent relies, it provides that "such premises wherever situate shall be closed on Christmas Day and Good Friday and on the days preceding Christmas Day and Good Friday respectively, as if Christmas Day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday, but this provision shall not alter the hours during which such premises shall be closed on Sunday when Christmas Day immediately precedes or succeeds Sunday." That section is dealing with the hours during which all licensed houses alike shall be closed, and for that purpose, and for that purpose only, it treats Christmas Day, if it does not fall on a Sunday, as if it were a Sunday, and makes the hours of closing on Christmas Day in the case of all licences, including six-day licences, the same as on Sunday. It does not purport to regulate the days on which the holder of a six-day licence must close his licensed premises. It is only dealing with hours, not days, of closing. The construction contended for on behalf of the respondent would make s. 3 of the Act of 1874 inconsistent with s. 49 of the Act of

1909

DAVIES v. HARRISON.

Lord Alverstone C.J.

1872, which only requires a six-day licence holder to close his premises on Sunday. The decision in *Forsdike* v. *Colquhoun* (1) seems to me to be in point, and I cannot see anything in the judgment of Pollock B. which is inconsistent with the opinion I am expressing. That was a case which raised the question whether Christmas Day was to be treated as a Sunday for the purposes of closing under the Sunday Closing (Wales) Act, 1881, and the Court held that it was not to be so treated. Pollock B. there said (2): "By s. 3 of the Act of 1874 the hours of closing were varied, and the hours named in the early part of the section as the Sunday closing hours were to apply to Christmas Day and Good Friday. This being the state of the law, the Welsh Act of 1881 was passed. That Act contains no interpretation clause defining the meaning of Sunday, nor is it directed to be read together with the Acts of 1872 and 1874; the word 'Sunday' must therefore have its ordinary meaning, and I am of opinion that it was used to have the effect of altering the Sunday hours by closing licensed houses entirely on that day." Inasmuch as s. 1 of the Sunday Closing (Wales) Act, 1881, requires all licensed houses to be closed during the whole of Sunday, and as by s. 2 the Licensing Acts, 1872 and 1874, are to apply in the case of any premises closed under the Act as if they had been closed under those Acts, it seems to me that the reasoning upon which that decision was based governs the present case. Christmas Day and Good Friday, therefore, are by s. 3 of the Act of 1874 treated as Sundays solely for the purpose of making the hours of closing of all licensed premises the same as on Sunday, and the section has not the effect of compelling a six-day licence holder to close his premises during the whole of Christmas Day, when it falls on a weekday, and Good Friday in addition to Sunday. The appeal must be allowed.

DARLING J. I am of the same opinion. The tenant of this licensed house holds a licence which is different from that held by most other licence holders in that he may not open his house at all on Sundays. He may open his house on Christmas Day, if it falls on a day other than a Sunday, during the same hours

(1) 11 Q. B. D. 71. (2) Ibid. at p. 73.

as other licence holders may keep open their houses on that day. The majority of the justices decided that he must not open his house at all on Christmas Day. I think that I can see the reason why they came to that conclusion. They were apparently frightened at what they thought might be the consequence of their holding that the house might be opened on Christmas Day. One of the contentions of the respondent was that if it were held that the appellant was entitled to open his premises on Christmas Day, then he had got for his six sevenths of the excise licence duty a greater benefit than the person paying the full duty, as there was nothing in the Act to say that a six-day licensee was to close his premises during the hours when other licensed premises were closed on Sundays, and the appellant could therefore open his premises all day on Christmas Day when it fell on any day other than a Sunday. The majority of the justices were led to suppose that that consequence might follow. It certainly does not follow. Our decision does not mean that the holder of a six-day licence may keep his house open all day on Christmas Day. He may keep his house open on that day for the same number of hours that other licensed persons can, and no more, provided that Christmas Day does not fall on a Sunday, and if Christmas Day falls on a Sunday he may not open his house at all.

JELF J. I am of the same opinion.

Appeal allowed.

Solicitors for appellant: *Godden, Son & Holme, for A. L. Lane, Gloucester.*

Solicitor for respondent: *C. T. Courtney Lewis, for Langley-Smith & Son, Gloucester.*

W. F. B.

C. A.

1909

March 17;
April 6.

[IN THE COURT OF APPEAL.]

BIRKIN AND OTHERS *v.* SMITH.

Licensing Acts—Licence, Compensation on refusal to renew—Tenants in Common of Lease of Licensed Premises—Action for Sale of Premises in lieu of Partition—Judgment by consent for Sale, and Payment of Proceeds into Court—Refusal of Licence under Licensing Act, 1904, *before Sale—Award of Compensation — Division of Compensation among Persons interested—Whole of Compensation in respect of Leasehold Interest apportioned to one Tenant in Common—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 2—*Licensing Rules*, 1904, *rr.* 21—27.

The plaintiffs, who claimed that they and others, being the children of one J. R., deceased, were interested as tenants in common with the defendant in a lease of certain licensed premises, of which the defendant was in possession through his tenant, brought an action in the Court of Chancery of the County Palatine of Durham, asking for a sale of the property in lieu of partition. In that action the defendant consented to judgment for an inquiry as to who were the persons interested in the property, and for an account of the rents and profits received by him; and by this judgment by consent it was further ordered that, if it were certified by the registrar of the Court that all persons interested in the property who were necessary parties were before the Court, the property should be sold with the approbation of the registrar, and the money to arise by the sale should be paid into Court to the credit of the action, subject to further order. By the certificate of the registrar made in pursuance of the judgment, it appeared that the plaintiffs and the other children of J. R. were entitled to one moiety, and the defendant was entitled to the other moiety, of the leasehold interest. Before any sale of the property was effected, the renewal of the licence in respect of the premises was refused by the compensation authority under the Licensing Act, 1904, ss. 1, 2, and the amount to be paid as compensation to the persons interested in the premises was determined by the Inland Revenue Commissioners under s. 2, sub-s. 2, of that Act to be 900*l.* A supplemental meeting of the compensation authority was subsequently held under the Licensing Rules, 1904, to determine the shares in which the compensation money should be divided amongst the persons interested in the premises. The Ecclesiastical Commissioners, who were the owners of the reversion on the lease, made no claim to any portion of the amount. A claim was made at the supplemental meeting on behalf of the children of J. R., who had not sent to the compensation authority any notice of claim as required by r. 21 of the Licensing Rules, 1904, to be treated as interested in the licensed premises, but the compensation authority refused to entertain their claim, or to hear them, on the ground that they had not complied with the provisions of r. 21, and proceeded to apportion the amount of the

compensation as follows, namely, 835*l.* to the defendant, who had been registered as the owner of the premises in the register of licences, and 65*l.* to the holder of the licence, his tenant. The defendant having received the 835*l.* so apportioned, an application was made on behalf of the children of J. R. for an order that he should bring that sum into Court, and the Chancellor of the County Palatine granted that application:—

Held, affirming his decision, that the determination of the compensation authority with regard to the shares in which the compensation was to be divided between the various interests in the premises did not determine the rights of the co-owners of the leasehold interest in the licensed premises inter se, and that the defendant was bound to bring the amount paid to him into Court to the credit of the action.

APPEAL from an order of the Chancellor of the County Palatine of Durham directing the defendant to bring into Court a sum of 835*l.*, which he had received as compensation on the refusal to renew the licence in respect of certain licensed premises, known as the Princess May Hotel, under the Licensing Act, 1904, s. 2. The following statement of facts is substantially taken from the judgment of the Chancellor of the County Palatine of Durham.

One James Richardson was in 1848 the owner of a lease of the premises from the Dean and Chapter of Durham. He had two sons, John and James; and by his will made on August 31, 1848, he bequeathed the before-mentioned property to his two sons for their respective lives in equal moieties, and, after their respective deaths, as to one moiety to the children of his son John in equal shares, and as to the other moiety to the children of his son James in equal shares. He died not long after making his will, which was proved on February 18, 1851. His two sons respectively parted with their life interests, and the children of James also parted with their interests expectant on his death, and ultimately, after various mesne assignments, the life interests of the two sons, and the interests of the children of James, all became vested in one Smith, who was a brewer. John Richardson died on March 11, 1899, and shortly afterwards his children set up their claim to a moiety of the leasehold property under the terms of their grandfather's will. Smith, who was then in possession of the premises by his tenant, disputed their claim, and an action was in consequence brought by two of John Richardson's children against Smith in the Court of

C. A. 1909

BIRKIN v. SMITH.

Chancery of the County Palatine of Durham, asking that the property should be sold and the proceeds divided among the persons entitled thereto, and that the defendant should account for the rents and profits received by him since March 11, 1899.

In the statement of defence delivered in the action by the defendant (1) it was stated, inter alia, with regard to the premises included in the before-mentioned bequest by James Richardson the elder, that John Richardson sold his interest in the same to his brother James Richardson, and the latter subsequently mortgaged the whole of his interest therein to the Durham Permanent Benefit Building Society, who, under powers contained in the said mortgage, sold the same to one Joseph Soulsby, who remortgaged the same to the said society, and the said society subsequently, under powers contained in the said mortgage, sold the same to the defendant on May 18, 1891; that the interest of the testator, James Richardson the elder, in the premises was leasehold only, and he held the same under a lease which expired on or before May 7, 1870, and the defendant submitted that the plaintiffs' interest in the said premises then ceased; and that the defendant now held the said premises under a lease dated July 20, 1870, and granted by the Dean and Chapter of Durham, as the owners of the said premises, to the said building society, the defendant's predecessors in title, in consideration of a sum of 15*l.* and certain annual rents paid by the said society and the defendant to the said Dean and Chapter, which said lease would expire on May 7, 1910.

The action came on for trial on April 6, 1900, when the defendant consented to judgment for an inquiry as to who were the persons interested in the property, and for an account of the rents and profits received by him since March 11, 1899. By this judgment by consent it was further ordered that, if it should be certified by the registrar of the Court that all persons interested in the property who were necessary parties to the action were before the Court, the property should be sold with the approbation of the registrar, and that the money to arise by such sale should be paid into Court to the credit of the action

(1) It is necessary to refer to the statements in the defence because the judgment of Joyce J. to some extent turns upon them.

subject to further order, and that any of the parties might apply to the Court as they might be advised. By a certificate given by the registrar in pursuance of the judgment. on September 27, 1907, he certified, in substance, that one moiety of the leasehold property belonged to the defendant, and that there were eight children of John Richardson entitled in equal shares to the other moiety of the property bequeathed to them by their grandfather's will, of whom six were living and two had died.

The application that the defendant should be ordered to pay the 835*l.* into Court as aforesaid was made on behalf of the six children of John Richardson who were still living, and the legal personal representatives of the two who had died, under the following circumstances. It was not disputed that, if the sale directed by the judgment had taken place, the six living children of John Richardson and the representatives of those who had died would have been among them entitled to half of the net proceeds of the sale; but the sale under the judgment had been delayed by consent of all parties, the defendant being meanwhile allowed to remain in possession of the premises by his tenant, and it had become no longer possible to sell the premises as licensed premises on account of proceedings which had been taken as after mentioned under the Licensing Act, 1904.

On February 11, 1907, objection was taken to the renewal of the licence in respect of the premises, and on March 7, 1907, the licensing justices referred the question whether the licence in respect of the premises should be renewed to the compensation authority under the Licensing Act, 1904, s. 1, sub-s. 2. On July 11, 1907, the compensation authority refused the renewal of the licence, whereupon compensation became payable to the persons interested in the licensed premises under s. 2, sub-s. 1, of the Act. The amount to be paid for compensation was thereupon assessed by the Inland Revenue Commissioners under s. 2, sub-s. 2, of the Act at 900*l.* Shortly after the refusal to renew the licence a notice was duly published by the compensation authority under r. 21 of the Licensing Rules, 1904, requiring persons, other than the licensee or the registered owner, who claimed to be interested in the premises to send in

C. A. 1909

BIRKIN v. SMITH.

their claims. On May 11, 1908, the compensation authority held a supplemental meeting under the Licensing Rules, 1904, to determine the shares in which the 900*l.* should be divided among the persons interested in the premises. The Ecclesiastical Commissioners, in whom the reversion on the lease had become vested, made no claim to any part of the compensation. The applicants had not sent in to the compensation authority any written claim in accordance with the provisions of r. 21 of the Licensing Rules, 1904, and they did not give to the compensation authority any notice of their claim before the above-mentioned supplemental meeting. At that meeting a claim was set up on their behalf, as being interested in the licensed premises, but the compensation authority refused to entertain it, or to hear them, on the ground that they had not complied with the provisions of r. 21, and proceeded to apportion the 900*l.* as follows, namely, 835*l.* to the defendant Smith, whose name was the sole name entered as that of the owner of the premises in the register of licences kept in accordance with the Licensing Act, 1872, s. 36, and 65*l.* to the holder of the licence, the defendant's tenant. On June 17, 1908, the compensation money was paid to the defendant Smith and the licensee, and the licence then was extinguished. The applicants thereupon made the application as aforesaid. The Chancellor of the County Palatine was of opinion that the applicants were entitled in equity to have the money received as aforesaid by the defendant Smith brought into Court to the credit of the action, and made an order accordingly.

Danckwerts, K.C. (*A. M. Latter* with him), for the defendant. The order appealed against was wrongly made. The effect of the proceedings which took place in this case under the Licensing Act, 1904, before the compensation authority was to entitle the defendant absolutely to the sum of 835*l.* apportioned to him by the authority as his share of the compensation for non-renewal of the licence fixed by the Inland Revenue Commissioners; and it is not competent for any one now to set up a claim in an action or other legal proceeding for a further apportionment of the sum so awarded. By s. 2, sub-s. 2, of the Licensing Act, 1904, the

amount of the compensation assessed under the Act is to be divided amongst the persons interested in the licensed premises, including the holder of the licence, in such shares as may be determined by the compensation authority. By r. 21 of the Licensing Rules, 1904, which were made under s. 6 of the Act, it is provided that, for the purpose of the "ascertainment of persons entitled to compensation," the compensation authority shall "publish a notice specifying the licensed premises, and stating that, if any person other than the licensee or the registered owner claims to be treated as a person interested in the licensed premises, he must, within twenty-one days after the publication of the notice, send to the compensation authority a written claim giving particulars of the interest claimed." The applicants did not send any such notice. By r. 22 "the persons interested in the licensed premises" within the meaning of s. 2, sub-s. 2, of the Act, "(1.) shall be deemed to be the licensee and the registered owner of the premises, if no claim to be treated as a person interested in the licensed premises is sent in to the compensation authority under these rules; and (2.) if a claim is so sent in, shall be deemed to be the persons who are determined to be the persons entitled to compensation in accordance with these rules." By r. 23, where a claim is so sent in, the authority is to hold a supplemental meeting for considering the claim, notice of which meeting is to be sent to the licensee and to the registered owner of the licensed premises, and to the claimant, and to any other person who has made a claim with respect to the premises. By r. 25 the compensation authority at any meeting so held is, after giving the licensee and the registered owner, and the claimant, and any other person who has made a claim, if present, an opportunity of being heard with reference to the claim, to "decide on the validity of the claim, and, after all the claims with respect to those premises have been disposed of, determine who are the persons entitled to compensation within the meaning of these rules with respect to those premises." By r. 27 the compensation authority is to hold a supplemental meeting for the purpose of settling the shares in the compensation money, and that meeting may, if they think fit, be held on the same day as

C. A. 1909

BIRKIN v. SMITH.

a supplemental meeting for the determination of the persons entitled to compensation. The Act and Rules together contain a complete code of procedure for the final determination of the question who the parties are amongst whom the compensation money is divisible, and a person to whom a sum of money has under that procedure been awarded by the compensation authority obtains an absolute statutory title to the money, and it is not competent to any other Court to review the decision of the authority and decide that any one else is interested in it. The applicants have only themselves to blame for what has happened by reason of their neglecting to give notice of their claim. They might have applied to the compensation authority under r. 6 of the Licensing Rules, 1904, for an amendment of the proceedings on terms, by which their claims might have been let in, but they appear to have made no such application. It is not disputed that, where there is an express trust by virtue of which the relation of trustee and cestui que trust exists between a person to whom a portion of the compensation money is awarded and another person in respect of that money, the trustee would hold the money in trust for the beneficiary. So also, as between a mortgagor and mortgagee, if a portion of the compensation money were awarded to the former, it would no doubt in his hands be subject to the mortgage in like manner as the property which it represents: see *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.* (1); *Noakes* v. *Noakes & Co., Ld.* (2) In that case one of the parties claims under the other. There is no analogy between those cases and the present. The defendant is not in the position of a trustee for the applicants, nor was he claiming under their right. He and they were not joint tenants, but tenants in common, and their titles and rights were independent of each other. *Bent's Brewery Co., Ld.* v. *Dykes* (3) is a clear authority in the defendant's favour. [He also cited *Bailey* v. *Hobson*. (4)]

Austen-Cartmell, for the applicants. There was really no default or laches on the part of the applicants in not giving notice of their claim. The devolution of the title to the leasehold property was very complicated, and the defendant

(1) [1906] 2 Ch. 98.
(2) [1907] 1 Ch. 64.
(3) (1909) 25 Times L. R. 347.
(4) (1869) L. R. 5 Ch. 180.

in the first instance disputed the plaintiffs' title. Consequently there had to be an inquiry into the title, and at the time when the notice to send in claims was published in this case by the compensation authority the certificate of the registrar with regard to the title had not been given. The defendant is claiming the whole of this money, to part of which he was not entitled at all, on a most technical construction of the Licensing Act, 1904. The admission that, as between a mortgagor and a mortgagee, compensation money apportioned to the former would be subject to the mortgage is really fatal to his contention, because, if that contention is right, and the proceedings under the statute give under such circumstances as these an unqualified statutory title to the person to whom compensation money is apportioned by the compensation authority, the same result must follow by parity of reasoning as between mortgagor and mortgagee. The suggested distinction between that case and the present will not hold good, for, in the supposed case, the right of the mortgagor and that of the mortgagee must be regarded, not as arising the one under the other, but as antagonistic rights. The same considerations also apply to the case of trustee and cestui que trust. The intention of the Act really is that the compensation authority shall deal with the question as to how the compensation money shall be apportioned among what may be called the various strata of interest in the licensed premises—namely, the interest of the licensee, that of the leaseholder, and that of the freehold reversioner—not that they shall determine finally the rights of those interested in respect of each such interest inter se. It would be impossible for the compensation authority to go into the complicated questions of title and account which might arise on the defendant's construction of the Act. The case of *Bent's Brewery Co., Ld.* v. *Dykes* (1) was a case in which the dispute appears to have been as to how the compensation was to be divided between the leasehold and the freehold interest, which is precisely what the Act did intend the compensation authority finally to decide. That case is therefore no authority for the present. The sum of money apportioned to the defendant should be regarded as being in the nature of either rents and profits

(1) 25 Times L. R. 347.

C. A. 1909

BIRKIN v. SMITH.

received by one tenant in common, or of a portion of purchase-money received on a sale of the property. What happened may be likened to a compulsory sale of part of the subject-matter of the tenancy in common after the decree for a sale. Suppose, a receiver having been appointed in respect of licensed property, he were to obtain an award of compensation under the Licensing Act, 1904, could he be heard to say that the compensation belonged to him personally? The logical result of the argument for the defendant would be that he could. Apart from the partition suit, a co-owner would be bound to account to his fellow co-owner in respect of profits. Here there is an a fortiori case, because an order for sale had been made, and the sale was only postponed until the certificate of title had been given by the registrar. [He cited *Dawson* v. *Braime's Tadcaster Breweries, Ld.* (1)]

Danckwerts, K.C., in reply.

Cur. adv. vult.

April 6. KENNEDY L.J. read the following judgment:—I am of opinion that the judgment of the learned Chancellor was correct. It is, as it appears to me, clear that, unless, as the appellant contends, one of the results of the proceedings of the compensation authority was to bar their right, the plaintiffs, as tenants in common of this leasehold property, are entitled with their co-tenants other than the defendant to one moiety of the sum of 835*l.*, less any expenses properly incurred in obtaining it, which has been received by the defendant, their co-owner, as registered owner of the Princess May public-house, and that the defendant on receiving it became liable to account to them for that moiety. The relation of co-ownership does not of itself give rise to a fiduciary relation between the co-owners: see *Kennedy* v. *De Trafford.* (2) But since the passing of the statute 4 & 5 Anne, c. 16, s. 27, an action of account, though not an action for money had and received (see *Thomas* v. *Thomas* (3)), will lie at the suit of one tenant in common against another who has received more than comes to his just share and proportion: see *Henderson* v.

(1) [1907] 2 Ch. 359. (2) [1897] A. C. 180.
(3) (1850) 5 Exch. 28.

Eason (1); *Jacobs* v. *Seward* (2); Lindley on Partnership, 7th ed., pp. 33 et seq.; Bullen and Leake, Precedents of Pleading, 3rd ed., p. 63. The sum of 835*l.* received by the defendant in the present case represents, in substance and reality, the value of a part of the common property of the plaintiffs and the defendant; and in my judgment the defendant, apart, as I have said, from any alteration in the relative rights of the parties such as the defendant alleges to have arisen from the proceedings before the compensation authority, became accountable to his co-owners for all beyond one-half of the money, subject to due allowance for proper costs or expenses, from the moment of its receipt. It was the duty of the Court, which by its order of April 6, 1900, had directed a sale of the common property for the benefit of all the co-owners, to take care that, if the defendant, the co-owner, who was for the time being permitted to remain in possession of the common property pending its sale, received, as he has done, from any source money which represented part of the value of that property, that money should be brought under the control of the Court for partition between all the co-owners in proportion to their respective interests; and this is what has been effected by the judgment against which the defendant has appealed.

The ground upon which the appeal is based is that the proceedings before the compensation authority under the Licensing Act, 1904 (4 Edw. 7, c. 23), and the rules made by the Secretary of State by virtue of s. 6 of that Act, have resulted in an award of compensation money to the defendant which entitles him to keep the whole of it for himself. It is unnecessary for the purpose of dealing with this point to repeat the history of those proceedings, all of which are set out in order in the Chancellor's judgment. In my view they had not the result for which the defendant has contended. In fact, in awarding, as they did, 835*l.* to the defendant as the registered owner of the licensed premises, the compensation authority did not adjudicate as between the other tenants in common (including the present plaintiffs) and the defendant. The plaintiffs, not having sent in any claim within the prescribed time, could be heard only if the compensation authority exercised their

(1) (1851) 17 Q. B. 701. (2) (1872) L. R. 5 H. L. 464.

C. A. 1909

BIRKIN v. SMITH.

Kennedy L.J.

discretionary power to consider their claim, although their notice of claim was out of time, and the compensation authority declined to exercise this discretion in the plaintiffs' favour. If the compensation authority had heard the plaintiffs' application, I must assume that it would have acted properly; and, in that case, it must have done one of two, or perhaps one of three, things. If it had before it the order made in the Palatine Court, but not the registrar's certificate (1), it might have postponed the apportionment until it also had the certificate, which settled the shares of all the tenants in common. Or if, as things then stood, the compensation authority felt itself in doubt as to the relative legal rights of the parties, it might have obtained the direction of a legal tribunal either by referring the matter to the county court, or by stating, as it may, a case for the judgment of the High Court. Or possibly, as a third course, the compensation authority might have awarded the whole sum to the defendant, as the registered owner of the licensed premises, without prejudice to all subsisting rights, legal or equitable, of the plaintiffs or other parties to have payment from the defendant either of the whole or of part of the compensation money when it had come into his hands, or to interfere with his disposal of it. In fact, the compensation authority, in regard to this 835*l.*, did not profess to adjudicate between the defendant and the plaintiffs. And in my view—to put the case most strongly against the plaintiffs—even if they had deliberately abstained from any application to the compensation authority, they would have in no degree impaired their right, as co-owners, to treat the defendant, who, as co-owner in possession, had obtained this profit out of the property to which in the partition suit they had established their title as tenants in common, and thereby the right to share proportionately in all moneys received by the tenant in possession, "as their bailiff" (to use the form of the pleading under the old

(1) The terms of this sentence have been slightly varied by the learned Lord Justice on revision from those used in the original written judgment read by him, as in that judgment the date of the certificate was taken to be September 27, 1908, whereas it was September 27, 1907, so that both the order and the certificate might have been before the compensation authority at the supplemental meeting, and this would have been decisive of the case.

procedure) in respect of this money, whether under the form of profits from, or that of moneys paid as consideration for, the common property or any part of it. The claims of the plaintiffs and of the defendant in regard to a share in the compensation money were not claims of a conflicting nature, but constituted in reality a collective claim in respect of ownership, and I do not think that the persons in the position of the plaintiffs forfeit any rights which they would otherwise be held to have simply because they are content to let their co-owner collect that which is due to the co-ownership. It is not, I think, necessary to refer to the decisions of Kekewich J. in *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co.* (1), of Neville J. in *Noakes* v. *Noakes & Co., Ld.* (2), or of Eve J. in *Bent's Brewery Co., Ld.* v. *Dykes* (3), which were referred to in argument. In coming to the conclusion to which I have come I am not, in my judgment, expressing any dissent from the principles stated and applied by any of the learned judges in those cases.

I will only add that my brother Joyce, whose judgment I have had an opportunity of reading, is further of opinion, for the reasons there stated, that the defendant ought to be regarded, in the circumstances, as actually in the position of trustee for the plaintiffs in respect of their interest in the compensation due under the Licensing Act, 1904, and that he stood, therefore, in a fiduciary position towards them in regard to this money. If that be so, it is unnecessary for the plaintiffs, in supporting the Chancellor's judgment, to rely upon the reasons which I have stated and which appear to me to be sufficient to justify the Chancellor's decision, apart from the considerations which arise from the establishment of the relation of trustee and cestui que trust. I am of opinion that this appeal should be dismissed with costs.

JOYCE J. read the following judgment:—This was an ordinary action for sale in lieu of partition. The property held in common consisted of a licensed public-house, the Princess May, being leasehold under the Dean and Chapter of Durham, the subsisting

(1) [1906] 2 Ch. 98. (2) [1907] 1 Ch. 64.
(3) 25 Times L. R. 347.

C. A. 1909

BIRKIN v. SMITH.

Joyce J.

term, though possibly, as I suspect, renewable by contract or usage, expiring on May 7, 1910. The judgment in the action, dated April 6, 1900, was by consent and in the common form, directing an inquiry as to the persons interested, an account of rents and profits against the defendant Smith from March 11, 1899 (the date of the death of John Richardson), followed by the usual directions for sale and bringing the proceeds into Court. If I rightly understand the statements of the defence, the present lease was granted on July 20, 1870, to the mortgagees of some of the parties then interested, and at the commencement of the action had been assigned to and was vested in the defendant Smith, although in equity the children of John Richardson, including the plaintiffs (as appears by the certificate dated September 27, 1907, under the judgment), had become and were entitled between them as from March 11, 1899, to a moiety of the lease. In the circumstances it seems to me that prior to and at the date of the judgment in the partition suit the defendant was actually a trustee for the children of John Richardson quoad a moiety of the premises. But if this were not so, this leasehold became bound by the judgment in the partition action to be realized for the benefit of all the co-owners, and under ss. 30 and 31 of the Trustee Act, 1893, the appropriate vesting order might be made as to the legal interest vested in any one of such co-owners. The defendant also became bound to account for all rents and profits received by him as from March 11, 1899. The leasehold and the defendant were both so bound, quite as much as if the defendant had formally executed an express covenant to the effect of the judgment.

The defendant upon his purchase in May, 1891, became owner of the entirety at law and also pro tempore in equity, that is until, as events turned out, the death of John Richardson on March 11, 1899, when John Richardson's children became entitled in equity to one moiety; and being such owner, he in the month of October, 1891, was registered under s. 36 of the Licensing Act, 1872, as the owner, though no copy of the actual entry was produced to the Court.

Pending the proceedings in chambers in the partition action, namely, on February 11, 1907, objection was taken to the

renewal of the licence before the licensing justices. Upon March 7, 1907, the matter was referred by the licensing justices to the compensation authority under s. 1, sub-s. 2, of the Act of 1904. On July 11, 1907, the compensation authority, at their principal meeting, decided to refuse the renewal of the licence subject to the payment of compensation. The amount of compensation to be paid to the persons interested in the licensed premises was left to be determined by the Inland Revenue Commissioners in accordance with s. 2, sub-s. 2, of the Act. The Inland Revenue Commissioners afterwards fixed the amount at 900*l.* The compensation authority at a supplemental meeting held on May 11, 1908, settled the shares in the compensation money as follows: 835*l.* to the defendant Smith as the registered owner, and 65*l.* to the actual licensee, one Mary Gates, who was the defendant's tenant. This 835*l.* was paid to the defendant on June 17, 1908, the 65*l.* was paid to Mary Gates, and the licence was thereupon extinguished.

It thus appears that the defendant has obtained payment of the whole of the compensation awarded in respect of the leasehold interest which in equity belonged to the parties as tenants in common. The sum so received by the defendant, in my opinion, is really the purchase-money or proceeds of sale of a portion of the property the subject of the judgment, or otherwise is profits of the premises received by the defendant since the judgment. In either case the defendant, to use the language of the statute of Anne (4 & 5 Anne, c. 16, s. 27), has received more than his share, and prima facie ought to account therefor.

But, on behalf of the defendant, an argument founded upon a literal interpretation of the provisions of the Licensing Act, 1904, and the Rules thereunder, was pressed upon us to the effect that the matter now in dispute was concluded by the decision of the justices when they awarded the compensation to be allowed in respect of the leasehold interest to the defendant, the registered owner. They, however, did not affect to determine any question as between the several co-owners in equity of the lease, even if they had jurisdiction to do so, which I doubt. In my opinion nothing they have done affects the rights of the beneficiaries claiming and entitled, as is the case

C. A. 1909

BIRKIN v. SMITH.

Joyce J.

with the children of John Richardson, under and through the defendant, any more than in the case of *Law Guarantee and Trust Society, Ld.* v. *Mitcham and Cheam Brewery Co., Ld.* (1), or of *Noakes* v. *Noakes & Co., Ld.* (2), the rights of the mortgagees, legal or equitable, were affected by the award of the compensation to the mortgagors. Nor is there really anything in the case before Eve J. of *Bent's Brewery Co., Ld.* v. *Dykes* (3) at variance with the decision the subject of the appeal.

The result is that in my opinion the learned Chancellor arrived at a perfectly right conclusion in holding the defendant liable to account for the compensation money he has received, which, it is common ground, was paid to him as the registered owner, and which was awarded and paid not merely in respect of his own moiety, but in respect of the entirety of the leasehold interest the subject of the action. I have no hesitation in deciding that the appeal be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Crossman & Prichard, for W. H. Oliver, Durham.*

Solicitors for defendant: *Helder, Roberts, Walton & Giles, for Simpson, Thomas & Co., Leeds.*

(1) [1906] 2 Ch. 98. (2) [1907] 1 Ch. 64.
(3) 25 Times L. R. 347.

E. L.

ARLIDGE, APPELLANT *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF ISLINGTON, RESPONDENTS. 1909 *March* 29.

London—Lodging-house—Cleansing—Duty on "Landlord"—Validity of By-law—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-s.* 1 (*e*); *s.* 116.

A by-law made by the council of a metropolitan borough under s. 94 of the Public Health (London) Act, 1891, required the landlord of a lodging-house to cause every part of the premises to be cleansed in the month of April, May, or June in every year. "Landlord" was defined as the person for the time being receiving the rack rent of the lodging-house, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack rent; and "lodging-house" was defined as a house or part of a house let in lodgings or occupied by members of more than one family, where the rent payable per week was below a certain sum. A penalty was imposed for breach of the by-law, but proceedings were not to be taken against the landlord until he had failed, after notice, to comply with the by-law:—

Held, that the by-law was unreasonable and bad, inasmuch as it applied to the case of a landlord who had let the house and had no right of entry, and who would therefore commit an act of trespass if he complied with the requirements of the by-law.

CASE stated by a metropolitan police magistrate.

A complaint was preferred on October 29, 1908, by the sanitary inspector on behalf of the respondents against the appellant for that the appellant being the landlord (as defined by the by-laws of the respondents made under the Public Health (London) Act, 1891, with respect to houses let in lodgings or occupied by members of more than one family) of a lodging-house (as defined by the by-laws) at 52, Brunswick Road, Upper Holloway, within the metropolitan borough of Islington, did not, during the month of April, May, or June, 1908, cause every part of the premises to be cleansed, and that a notice in writing by the respondents was served on the appellant requiring him within the reasonable time specified in the notice to comply with the by-laws, and that the appellant had failed to comply with the by-laws (1) within the time so specified.

(1) See note on p. 136. post.

1909

ARLIDGE v. ISLINGTON CORPORATION.

Upon the hearing of the complaint the following facts were admitted or proved in evidence:—

The house known as No. 52, Brunswick Road, Upper Holloway, was within the metropolitan borough of Islington and was a lodging-house within the meaning of the by-laws. The appellant was the landlord thereof within the meaning of the by-laws, having acquired the premises in 1903 subject to a quarterly tenancy in them then and now held by one William Hatherill at a rent of 28*l.* per annum. Hatherill paid all rates and taxes in respect of the premises. The tenancy which he held was not in writing, and no right of entry upon the premises was reserved to the landlord. The house consisted of eight rooms and a workshop in addition to the scullery and usual offices. Hatherill resided upon the premises. In and before the year 1903 and ever since that date he let parts of the house to lodgers. At the date of these proceedings he was letting two rooms on the ground floor on a weekly tenancy at a rent of 6*s.* a week, and one room in the basement on a weekly tenancy at a rent of 3*s.* 6*d.* a week. These rooms were let to the respective occupiers in June, 1904, and October, 1905. Another room was usually let to a lodger, but at the date of these proceedings it was empty. The remainder of the house was at such date in Hatherill's own occupation.

In April, 1908, a notice was served by the medical officer of health on behalf of the respondents upon the appellant, requiring him as the "landlord" of the house within the definition in the by-laws made by the respondents under s. 94 of the Public Health (London) Act, 1891, to comply with by-law 17, namely, to cause every part of the premises to be cleansed in the month of April, May, or June, 1908, and stating that in default of compliance he would incur the penalties mentioned in the notice.

The notice not having been complied with, the respondents on October 9, 1908, served notice on the appellant, as the landlord of the house within the meaning of the by-laws, requiring him within seven days from the service of the notice to comply with the provisions of by-law 17 (setting it out), and specifying certain rooms which required to be thoroughly cleansed, and stating

1909

ARLIDGE v. ISLINGTON CORPORATION.

that in default of his complying with the notice within the seven days he would be liable to a penalty of 5*l.*, and in case of a continuing offence to a penalty of 40*s.* for each day after failure to comply with the notice.

The appellant did not cause any part of the premises to be cleansed in the month of April, May, or June, 1908, or otherwise comply at any later date with the requirements of the notices.

The respondents contended that the appellant, being the "landlord" of the house within the meaning of the by-laws, was liable to the penalties imposed by by-law 21 in respect of his failure to cause every part of the premises to be cleansed in the month of April, May, or June, 1908.

The appellant contended that he was not liable to cause the premises to be cleansed as aforesaid; that the by-laws, in so far as they purported to impose such a liability upon him in respect of the premises, were invalid as being unreasonable and ultra vires of the respondents; and that the entry of the appellant on the premises to comply with the notices and by-laws would have been a trespass on his part, and that the appellant could not be liable to a penalty under the by-laws if he could not comply with their requirements without committing a trespass.

The magistrate was of opinion that the contention of the respondents was correct and that the by-laws were not unreasonable or otherwise invalid, and he was further of opinion that, as the appellant could under the circumstances of Hatherill's verbal tenancy have acquired a right of entry upon the premises so as to comply with the by-laws without committing any trespass, he was liable to the penalty imposed by them. He accordingly convicted the appellant and fined him 20*s.* and ordered him to pay 3*l.* 3*s.* for costs.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Macmorran, K.C. (*Naldrett* with him), for the appellant. By-law 17 has imposed the duty of causing a lodging-house to be cleansed each year upon the landlord of the house. "Landlord" is defined in by-law 1 as meaning the person receiving the rack

1909

ARLIDGE v. ISLINGTON CORPORATION.

rent of the house, whether on his own account or as agent or trustee for another person. He may therefore be a mere rent collector and have no control at all over the house. The definition of landlord is the same as that of "owner" in s. 141 of the Public Health (London) Act, 1891, and in s. 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). Sect. 94 of the Public Health (London) Act, 1891, which corresponds with s. 90 of the Public Health Act, 1875, contemplates that the person who has the control of the lodging-house, that is, the tenant who lets it as lodgings, shall be responsible for its being kept cleansed: *Stiles* v. *Galinski*. (1) A by-law which imposes that duty upon the landlord, who may have no control and no means of control over the house, and a breach of which renders him liable to criminal proceedings, is unreasonable and invalid. When dealing with common lodging-houses, s. 82 of the Public Health Act, 1875, imposes the duty of limewashing the walls and ceilings twice a year upon the keeper of the lodging-house. The same principle ought to be applied to a house let in lodgings which is not a common lodging-house. Apart from special circumstances the occupier of premises is at common law liable for a nuisance arising out of the occupation of the premises, and not the landlord. Under s. 4, sub-s. 3 (*a*), of the Public Health (London) Act, 1891, where the nuisance arises from a structural defect, the notice to abate must be served on the owner. It might be that, if the by-law had followed s. 5 of the Act, which deals with non-compliance with an order to abate a nuisance, and had given the local authority power to do the work upon default by the landlord, the by-law would be good: *Broadbent* v. *Shepherd*. (2) There is no such provision in these by-laws, and by-law 17 imposes the absolute duty upon the landlord of causing the house to be cleansed, and by-law 21 imposes a penalty upon him if he fails to do so. These are new by-laws made since the decision in *Stiles* v. *Galinski* (3), where it was held that a by-law dealing with a similar subject-matter was unreasonable and bad because it did not provide that a landlord, before becoming liable to a

(1) [1904] 1 K. B. 615, at pp. 622, 625. (2) [1901] 2 K. B. 274.
(3) [1904] 1 K. B. 615.

penalty for a breach of the by-law, should receive notice that the requirements of the by-law had not been complied with. By-law 20 in the present by-laws supplies that omission. The dictum of Lord Alverstone C.J. in that case (1), that he did not think that a by-law would necessarily be bad because it imposed a duty upon a landlord who might be a person having no connection with the premises beyond receiving the rent, ought not to be followed. In the model by-laws upon this subject issued by the Local Government Board the term "landlord" is defined as having a much narrower meaning than that given to it in these by-laws. (2) By-law 17 is therefore unreasonable and bad.

Secondly, assuming that this duty can be imposed upon a landlord as defined in by-law 1, it cannot be imposed upon a landlord who has not reserved a right of entry on the premises. An order to abate a nuisance is bad if it involves the committal of a trespass: *Mayor, &c. of Scarborough* v. *Scarborough Rural Sanitary Authority*. (3) In *Parker* v. *Inge* (4) the Court did not say that the landlord would be liable to a penalty for not obeying the order to abate the nuisance if he had no right to enter on the land and could not get the tenant's consent for that purpose. The same principle has been applied to an order to provide means of escape in a factory in case of fire: *London County Council* v. *Lewis* (5); *London County Council* v. *Brass*. (6) In the present case the landlord cannot do the work except by committing a trespass. By-law 17 is oppressive and unreasonable because, taken together with by-law 21, it makes the landlord criminally responsible for failing to do certain work upon premises into which he has no right of entry. The by-law is therefore bad.

Avory, K.C. (*Courthope-Munroe* with him), for the respondents. The by-laws made by a public representative body who know the needs of their district ought to be supported by the Court: *Kruse* v. *Johnson*. (7) The circumstances of each locality vary, and each local authority knows its own wants. A by-law as to houses let in lodgings which may be reasonable in Islington

(1) [1904] 1 K. B. 615, at pp. 622, 623.
(2) See Mackenzie and Handford's Model By-laws, vol. 1, p. 445.
(3) (1876) 1 Ex. D. 344.
(4) (1886) 17 Q. B. D. 584.
(5) (1900) 69 L. J. (Q.B.) 277.
(6) (1901) 17 Times L. R. 504.
(7) [1898] 2 Q. B. 91.

1909.

ARLIDGE v. ISLINGTON CORPORATION.

may be unreasonable in Mayfair. The local authority may well have thought that it would be quite useless in Islington to impose the duty of cleansing a house, the various rooms in which are let to lodgers, upon the tenant, who might be a man of straw occupying one room in the house and letting the rest. The by-laws discriminate between the duties of the landlord, the tenant, and the lodgers. For instance, under by-law 10 the landlord or the tenant is to keep the drains in good order, and under by-laws 11, 12, and 13 the lodger is to sweep the floors of his rooms, to clean the windows and fittings, and to remove all filth and refuse. The respondents, knowing the class of people who occupy these houses, have made by-law 17, and as it is a by-law for the good of the whole community it ought to be upheld. The defect pointed out by the Court in the by-laws in *Stiles* v. *Galinski* (1) has been remedied in the present by-laws, by-law 20 providing for notice being given to the landlord calling upon him to comply with the by-law before proceedings are taken against him. The observation of Lord Alverstone C.J. in that case (2) shews that this by-law is good.

The fact that the house is let to a tenant and that the landlord has not reserved a right of entry does not make the by-law bad. If a landlord chooses to own this class of property, it is his duty either himself to comply with this by-law or to see that his tenant does so. It is a fanciful argument to say that a tenant, who is under no obligation to repair, will object to his landlord coming upon the premises for the purpose of doing the work of cleansing. The Court will not hold the by-law to be bad because there may be one unreasonable tenant in the district who will object. But, however that may be, s. 116, sub-s. 2, of the Public Health (London) Act, 1891, gets rid of that suggested difficulty, because it provides that "where the occupier of any premises prevents the owner thereof from obeying or carrying into effect any provision of this Act," a petty sessional court shall order the occupier to permit the execution of the works which are necessary for the purpose of obeying or carrying into effect the provision of the Act. Regulations and by-laws made under the Act have the same force as the provisions of the Act and become part of

(1) [1904] 1 K. B. 615. (2) Ibid. at pp. 622, 623.

the provisions of the Act: *Willingale* v. *Norris*. (1) Therefore the landlord could have had the work done without committing a trespass. The decision of the magistrate was right.

Macmorran, K.C., in reply. With regard to s. 116 of the Act of 1891, a by-law made under the Act may have the same force as a provision of the Act, but it is not itself a provision of the Act. An illustration of this appears in s. 251 of the Public Health Act, 1875, which gives a summary remedy before a Court of summary jurisdiction for offences under the Act, and it has always been considered doubtful whether that applies to a by-law made under the Act. Consequently s. 6 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), was passed, which gives a summary remedy for offences under any by-law made under the Act of 1875 or any Act amending it.

LORD ALVERSTONE C.J. In this class of cases I am always most desirous of supporting, if I possibly can, by-laws made, after inquiry into the matter, by local authorities with regard to local matters; and I may add that I sympathize with the desire of the local authority to have this provision of the Public Health (London) Act, 1891, efficiently carried out by means of a by-law somewhat in the nature of the present by-law, because I am not at all satisfied that, from a sanitary point of view, the protection afforded by imposing upon the tenant the obligation of causing the premises to be cleansed would be sufficient. The question, however, which we have to consider is whether this by-law is or is not unreasonable and therefore bad.

When I gave my judgment in the case of *Stiles* v. *Galinski* (2) I must, for some reason which I cannot now call to mind, have considered that there was not much weight in the objection that the landlord might be a person who had no control over the premises and no right of entry upon them. For some reason or another I expressed an opinion in that case in which I seem to have gone further than I ought to have gone. At the same time it may be—I say no more than that—that a by-law might be framed which imposed the duty of causing the lodging-house to be cleansed prima facie upon the landlord,

(1) [1909] 1 K. B. 57. (2) [1904] 1 K. B. 615, at pp. 622, 623.

1909

ARLIDGE v. ISLINGTON CORPORATION.

Lord Alverstone C.J.

giving to the word "landlord" a definition as wide as that contained in these by-laws, but which allowed him to shew that he had no right of entry so that he could not obey the requirements of the by-law, or which was expressly limited to cases where the landlord was in a position to compel his tenant to carry out the requirements of the by-law. The present by-law is, in my opinion, too wide, and I regret if anything which I said in *Stiles* v. *Galinski* (1) should have led to the framing of the by-law in its present form.

By-law 17 provides that "subject to the provisions of these by-laws the landlord of a lodging-house shall, in the month of April, May, or June in every year, cause every part of the premises to be cleansed." That is the material part of the by-law. The rest of the by-law prescribes the method of cleansing certain parts of the premises. By-law 21 imposes a penalty for breach of any of the by-laws. If by-law 17 had used some such words as "take reasonable steps" or "take reasonable means" to cause every part of the premises to be cleansed, or if the by-law had first imposed the duty upon the tenant with a right to proceed against the landlord where the latter was in a position to enforce performance of the duty, I do not say that it might not have been valid. It seems to me that there are not a few forms in which this by-law would be valid, but for the reasons which have been urged upon us on behalf of the appellant I think that this by-law goes too far. It imposes an imperative obligation upon every landlord to cause the premises to be cleansed without regard to the position in which the landlord may be. I do not rest my judgment upon the fact that the landlord may be an agent employed by an absent owner to collect the rents and look after the property, because I recognize that it may be necessary for the enforcement of the sanitary provisions of the Act to fasten the liability on the agent of the owner, though apart from the Act there may be no duty upon him personally to cause the work to be done. But this by-law seems to me to go beyond anything which the necessity of the case demands. An absolute duty is imposed on every landlord to cause the premises to be cleansed,

(1) [1904] 1 K. B. 615, at pp. 622, 623.

and a penalty is imposed for breach of that duty, when the landlord may be quite unable to carry out the work without breaking a contract or committing a trespass. The by-law is therefore unreasonable and bad. I desire to add that I am not satisfied at present that a by-law could be made giving the local authority power to enter and do the work in default of the landlord doing it. That might, it rather seems to me, require statutory authority.

The appeal must be allowed.

DARLING J. I am of the same opinion. At one time I was inclined to think that the difficulties to which our attention has been called in the way of a landlord being able to enter upon the premises and carry out the necessary work were disposed of by s. 116, sub-s. 2, of the Public Health (London) Act, 1891. But upon careful consideration of that section I do not think that it meets the difficulty, and a landlord might still be left in many cases, as, for instance, where he had let the house without reserving any right of entry, in very great difficulty in carrying out the requirements of by-law 17, and might be exposed to an action if he attempted to do so. It seems to me to be useful in this connection to refer to the observations of Wills J. at the beginning of his judgment in *Stiles* v. *Galinski*. (1) I do not propose to read those observations, but he there points out how difficult it is to apply a by-law like this one to houses other than common lodging-houses. It is always difficult to say in any particular case whether or not a by-law oversteps the limits of reasonableness; but in this case I have come to the conclusion that the by-law is unreasonable and goes beyond the authority intended to be conferred by the Act under which it purports to be made.

JELF J. I am of the same opinion. I think that the very fact that a by-law which is properly made becomes of the same force and validity as the Act under which it is made makes it the more incumbent on the Court to take care that the by-law is not open to a construction which in many cases might work injustice. I wish especially to emphasize the warning given by

(1) [1904] 1 K. B. 615, at pp. 624, 625.

1909

ARLIDGE v. ISLINGTON CORPORATION.

Jelf J.

Wills J. in *Stiles* v. *Galinski* (1) where he said: "I desire to protest strongly against one argument put forward in support of the by-laws, namely, that although they might be considered harsh and unjust if applied all round, yet the local authority may be trusted only to put them in force in cases where it would be reasonable to do so. In the first place, the local authority are not the only persons who can set the law in motion; every subject of the Crown is entitled to do so; and, secondly, I dislike extremely legislation which is felt to be so unfair if universally applied that it can only be justified by saying that in particular cases it will not be enforced. I think that that is as bad a ground for defending legislation as one could well have." I entirely agree with that, and I think that the Court may always test the reasonableness of a by-law by its application in an extreme case. I do not follow the argument put forward on behalf of the respondents, that, although it might be a trespass for a landlord to enter upon the premises and do the necessary work where the tenant refused his consent, that is not likely to arise, because the tenant will be only too glad to allow the landlord to come in and do the whitewashing or other necessary work. I am afraid that tenants are not always so sensible as that, and it seems to me that to impose upon the landlord of every house let in lodgings the obligation of causing the house to be cleansed, though he may not be able to carry out the work without rendering himself liable to be treated by his tenant as a trespasser, and then to subject him to a penalty for a breach of that obligation, is most unreasonable. Nor do I think that s. 116, sub-s. 2, of the Act meets the difficulty. That enactment is amply satisfied by reference to what is contained in the Act itself. I agree that this by-law is unreasonable and invalid.

Appeal allowed.

Solicitors for appellant: *Rubinstein, Myers & Co.*

Solicitor for respondents: *A. M. Bramall.*

NOTE.—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 94 (which comes under the heading "By-laws as to houses let in lodgings"):

(1) [1904] 1 K. B. 615, at p. 625.

"(1.) Every sanitary authority shall make and enforce such by-laws as are requisite for the following matters; (that is to say), (*a*) for fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family, and for the separation of the sexes in a house so let or occupied . . . . (*e*) for the cleansing and limewashing at stated times of the premises . . . ."

Sect. 99 defines the "sanitary authority" as, among others, the vestry of the parish, the powers of which were transferred by s. 4 of the London Government Act, 1899 (62 & 63 Vict. c. 14), to the respondents.

By-laws made by the respondents and allowed by the Local Government Board on August 6, 1906:

1. "In these by-laws, unless the context otherwise requires, the following words and expressions have the meanings hereinafter respectively assigned to them: that is to say—'Council' means the mayor, aldermen, and councillors of the metropolitan borough of Islington. 'Lodging-house' means a house or part of a house in the said borough, which is let in lodgings or occupied by members of more than one family. 'Landlord' in relation to lodging-house means the person for the time being receiving the rack rent of the lodging-house, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack rent. 'Tenant' in relation to a lodging-house means the person (whatever may be the nature or extent of his interest in the premises) by whom or on whose behalf the lodging-house is let in lodgings, or for occupation by members of more than one family, or who for the time being receives or is entitled to receive the profits arising from such letting, whether on his own account, or as agent or trustee for any other person. 'Lodger' in relation to a lodging-house means a person to whom any room or rooms in the lodging-house may have been let as a lodging for himself and his family, if any, or for use and occupation by himself and his family, if any."

17. "Subject to the provisions of these by-laws the landlord of a lodging-house shall, in the month of April, May, or June in every year, cause every part of the premises to be cleansed.

"Subject as aforesaid the landlord of a lodging-house shall, in the same period, except in such cases as are hereinafter specified in the next following clause, cause every area, the interior surface of every ceiling and wall of every watercloset belonging to the premises, and the interior surface of every ceiling and wall of every room, staircase, and passage in the house to be thoroughly limewashed, in every case where limewashing is necessary for effective cleansing.

"Subject as aforesaid where the internal surface of the rooms, staircases, and passages in a lodging-house or of any part thereof is painted, or where the material of or with which such surface is constructed or covered is such as to render the limewashing thereof unsuitable or not necessary for effective cleansing, the landlord shall in the same period aforesaid cause such surface to be thoroughly cleansed and the paint or other covering thereof to be renewed, if the renewal thereof shall be necessary for the purpose of keeping the premises in a cleanly and wholesome condition . . . ."

20. "Where a duty imposed upon or a prohibition applied to the landlord

1909

ARLIDGE v. ISLINGTON CORPORATION.

or the tenant of a lodging-house, as the case may be, is by any by-law expressly imposed or applied subject to the provisions of these by-laws, proceedings shall not be taken against the landlord or the tenant for an offence against the by-law unless and until the landlord or the tenant, after service upon him of a notice in writing by the council requiring him within such reasonable time as is specified in the notice to comply with the by-law, has failed to comply with the by-law within the time so specified."

21. "Every person who shall offend against any of the foregoing by-laws shall be liable for every such offence to a penalty of 5*l.*, and in the case of a continuing offence to a further penalty of 40*s.* for each day after failure to comply with a written notice of the offence from the council. Provided nevertheless that the justices or Court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this by-law."

By-law 2 exempts from the operation of the by-laws a lodging-house where the tenant resides on the premises, and the sub-letting by such tenant is to not more than one lodger; or where the rent or charge payable by each lodger is not less than a certain sum per week, varying according to the number of rooms occupied.

W. F. B.

1909
March 24.

LONDON COUNTY COUNCIL *v.* DISTRICT SURVEYORS' ASSOCIATION AND WILLIS.

London—Building Notice—School—Local Education Authority—Obligation to serve Notice—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 145, 201.

The appellants as the local education authority for London commenced to erect a building to be used as a public elementary school.

By the code of building regulations for public elementary schools issued by the Board of Education in pursuance of the Education Acts, 1870 to 1902, such buildings are required to comply with the provisions therein stated as to the height and dimensions of the rooms, corridors, and staircases, the construction of the walls, floors, roofs, and staircases, the lighting, ventilating, and warming of the buildings, and the sanitary arrangements in connection with them.

By s. 201, sub-s. 5, of the London Building Act, 1894, "public buildings occupied for public purposes by the County Council of London" are exempt from the operation of the portion of that Act relating to the construction of buildings.

The appellants did not before commencing to build serve a building notice upon the district surveyor in accordance with s. 145 of the said Act:—

Held, that the appellants were not exempt from the obligation to serve

a building notice either by the fact that the building was a public elementary school and as such subject to the jurisdiction of the Board of Education, or that it was a "public building occupied" by the appellants "for public purposes," or that the district surveyor was an officer appointed and dismissible by the appellants.

CASE stated by a metropolitan police magistrate.

The appellants were summoned upon an information laid by the respondents charging that the appellants at Hotham Road, Putney, in the borough of Wandsworth and within the district of Putney and Roehampton, of which district the respondent Willis was the district surveyor, being persons who ought to serve a building notice, did fail to do so contrary to the provisions of the London Building Acts, 1894 to 1905. The magistrate convicted the appellants subject to this case for the opinion of the High Court.

By virtue of the Education Acts, 1870 to 1902, and of the Education (London) Act, 1903, the appellants are the local education authority within the area of the borough of Wandsworth, within which Hotham and Charlwood Roads are situate. Under a provisional order set forth in the Education Board Provisional Order Confirmation (London No. 2) Act, 1905 (5 Edw. 7, c. civ.), certain lands, houses, and premises situate in and bounded by Hotham Road and Charlwood Road respectively were acquired by the appellants as such local education authority for the purpose of providing elementary education under the provisions of the said Education Acts. Upon the site so acquired there were proposed to be erected not only the buildings intended for actual school purposes, but various outlying buildings, such as a schoolkeeper's house, lavatories, covered playgrounds, &c., for the accommodation of 612 children. In due course the appellants caused detailed plans to be prepared shewing the proposed buildings and their respective situations on the land acquired as before mentioned. The appellants also caused a specification to be prepared and tenders obtained for erecting the whole of the buildings on the said land. A tender by Messrs. Holliday & Greenwood, Limited, builders, was accepted for the erection of the buildings at a cost of 12,929*l*. For the purpose of raising the question of law involved in this

1909

LONDON COUNTY COUNCIL v. DISTRICT SURVEYORS' ASSOCIATION AND WILLIS.

case the said builders were requested by the appellants not to send a building notice in pursuance of s. 145 of the London Building Act, 1894, to the respondent Willis as district surveyor, and they did not do so. A similar information to that against the appellants was laid against the builders, but by agreement between the appellants and the respondents the builders were dismissed from any proceedings in respect thereof.

Under the said Education Acts, 1870 to 1902, and the code of regulations for public elementary schools in England issued by the Board of Education in pursuance of the said statutes, and under the directions of the Board of Education, the appellants duly submitted the said plans and specification in respect of the proposed school to the Board of Education, and the same were approved by that Board on February 14, 1908, as being in due compliance with the said Education Acts, the said code of regulations, and the building regulations issued by the Board of Education, which latter provide (inter alia) for the arrangement of the school buildings, the height and dimensions of the rooms, corridors, staircases, &c., the construction of walls, floors, roofs, staircases, &c., the lighting, ventilating, and warming thereof, the sanitary arrangements in connection therewith, and numerous other details as appears in and by the said building regulations. (1) The London School Board during its existence always adopted a similar course. The Board of Education, in giving their approval, required in respect of the whole of the buildings proposed to be erected on the said site the certificate of the architect appointed by the appellants to design and supervise the erection of schools and school buildings in the area for which the appellants are the local education authority that the same complied with the provisions of the said code and building regulations.

(1) These regulations were issued on June 18, 1907. Part I. of the regulations, as is stated in a prefatory note thereto, relates to "the principles on which a building should be arranged and fitted in order to secure conditions favourable to effective teaching," and Part II. contains the "Rules as to the hygienic and sanitary conditions of the premises, the construction of the fabric, and the safety of the scholars in cases of emergency." The principal special rules with regard to the construction of the fabric are that the external walls shall be of a certain thickness, and that the floors shall be sound-proof.

The buildings were commenced to be erected on or about May 11, 1908, but no notice by the builders or by the appellants as building owners was given under s. 145 of the London Building Act, 1894, to the respondent Willis as district surveyor in regard thereto.

It was proved or admitted that the London School Board, the predecessors of the appellants as the education authority for the London educational area (and also the appellants up to 1905), had in regard to schools erected by them given notice to the district surveyor in compliance with s. 145 of the London Building Act, 1894, and any Acts amending or extending the same, and that district surveyors had on more than one occasion raised questions under s. 78 of the London Building Act, 1894, in regard to such schools. It was further proved or admitted that in earlier statutes similar to the Education Board Provisional Order Confirmation (London No. 2) Act, 1905, there had been inserted clauses by which the London Building Act, 1894, and any Act amending or extending the same were, as it was contended by the appellants, rendered applicable to the erection of buildings for elementary education purposes on land acquired by the London School Board under the provisional orders sanctioned by such Acts, but that such a clause had not been included in the said Act of 1905, and that that Act was passed at a time when by reason of the Education (London) Act, 1903, coming into operation the appellants had become the local education authority.

It was also proved or admitted that many buildings (such as offices or fire brigade stations) occupied by the London County Council or their predecessors, the Metropolitan Board of Works, were in practice treated as subject to the provisions of the London Building Acts for the time being in force both before and after 1894.

The magistrate was of opinion that the appellants were required to comply with the provisions of s. 145, and having omitted to serve the notice therein mentioned had committed the offence charged in the information.

Lush, K.C., and *Bodkin*, for the appellants. The appellants are exempt from the obligation of serving a building notice. By

1909

LONDON COUNTY COUNCIL v. DISTRICT SURVEYORS' ASSOCIATION AND WILLIS.

s. 201, sub-s. 5 (1), "sessions houses or other public buildings . . . . occupied for public purposes . . . . by the County Council of London" are exempt from the operation of Part VI. of the Act, relating to the construction of buildings, and a public elementary school is a building of that description. By s. 5, sub-s. 27, "The expression 'public building' means a building used or constructed or adapted to be used . . . . as a school college or place of instruction (not being merely a dwelling-house so used)"; and where the school is a public elementary school it is "occupied for public purposes." It is true that s. 145, which imposes the obligation of serving a building notice, occurs in Part XIII. and not in Part VI. But the district surveyor has no duties in connection with the erection of a building under any part of the Act other than Part VI. The mere fact that Part XIII. is not in terms referred to in s. 201 does not necessarily involve the conclusion that it was not intended to exempt the appellants' schools from that part. Secondly, apart from any exemption contained in the Act itself, the appellants are exempt by reason of the fact that, the building being a school, they have to comply with the building regulations of the Board of Education, including the rules as to thickness of walls, &c. It cannot have been intended that there should be two conflicting authorities having jurisdiction over the same subject-matter. The special jurisdiction of the Board of Education must override the general jurisdiction of the district surveyor. Thirdly, the district surveyor is an officer who by s. 139, sub-s. 1 (*b*), may be dismissed by the appellants, and by sub-s. 1 (*d*), upon a vacancy occurring in that office, the appellants may appoint another person to fill it. It cannot have been meant that the appellants themselves should be bound to serve a building notice on their own servant.

(1) By s. 201 of the London Building Act, 1894, "The following buildings and works shall be exempt from the operation of Parts VI. and VII. of this Act: . . . .

"(5.) The Sessions House at the Old Bailey and all other sessions houses or other public buildings belonging to or occupied for public purposes by the justices of the peace of the counties of Middlesex London and the City of London or by the County Councils of London and Middlesex respectively."

Avory, K.C., and *Ryde*, for the respondents. A district surveyor is not the servant of the appellants, though he is to some extent under their jurisdiction. He is a person having a statutory position and duty cast upon him: per Lord Alverstone C.J. and Channell J. in *Westminster Corporation* v. *Watson* (1); and his relation to the county council affords no reason why they should not be subject to the obligations of s. 145 to the same extent as other building owners. Nor is any exemption from that obligation created by s. 201. In the first place, a public elementary school, although no doubt it is a "public building" within the definition in s. 5, sub-s. 27, is not "occupied for public purposes." The test whether a building is so occupied is whether it is "a place to which the public can demand admission": *Moses* v. *Marsland* (2), following *Josolyne* v. *Meeson*. (3) Secondly, even if it were so occupied, the exemption afforded by the section is only from Parts VI. and VII., which do not include s. 145. With regard to the building regulations of the Board of Education there is nothing inconsistent between them and the provisions of s. 145. The former are designed in the interests solely of the children attending the school. The requirement of notice to the district surveyor is designed mainly in the interests of the outside public and not in those of the persons using the building itself.

Lush, K.C., in reply.

LORD ALVERSTONE C.J. I am unable to see any reason for differing in this case from the general principle on which we have decided similar cases. No doubt it is within the competence of Parliament to enact that a public body, such as the Board of Education or the county council, shall have power to direct how a particular building shall be built without any interference from any other authority, and it might be a proper provision to enact that the district surveyor should have no power at all over certain buildings, but the question is whether Parliament has so enacted. It was sought on behalf of the appellants to establish that the school in question was exempted from the operation of the

(1) [1902] 2 K. B. 717. (2) [1901] 1 K. B. 668.
(3) (1885) 53 L. T. 319.

1909

LONDON COUNTY COUNCIL v. DISTRICT SURVEYORS' ASSOCIATION AND WILLIS.

Lord Alverstone C.J.

London Building Act, 1894, by s. 201, sub-s. 5, as being a "public building . . . . occupied for public purposes . . . . by the County Council of London." That section is in terms expressed to exempt the classes of buildings therein specified from Parts VI. and VII. of the Act only, and those parts do not include s. 145, under which notice of a building being about to be begun is required to be given by the builder to the district surveyor. But it was said that the exemption from the operation of Part VI., which relates to the construction of buildings, involves by implication an exemption from the operation of any other part of the Act requiring a notice to be given to the district surveyor as a preliminary to the construction of a building. The necessity of such an implication I confess I am unable to understand, and it seems to me that, if that was the real intention of the Legislature, the Act must have used different language. Moreover, the Act provides different degrees of exemption for different classes of buildings; thus whereas s. 201 exempts certain buildings from Parts VI. and VII., s. 202 provides for another class, that of Government buildings, a wider exemption, namely, from so much of the provisions of the Act as relates to buildings and structures in whatever part they may be contained, while s. 204 gives to buildings belonging to the Inns of Court an exemption from the whole Act with the exception of the provisions of Part III. relating to lines of building frontage. In my opinion it is impossible to say that the exclusion of the application of Part VI. to such a building as the one in question shews that there is no use in giving a building notice in respect of it. The Legislature does by the provisions in other parts of the Act, such as Part V., relating to the height of buildings, and Part XIV., relating to by-laws, contemplate the necessity of the district surveyor watching the erection of such a building in the interests of the general public and of the adjoining owners. Then Mr. Lush contended that the position of the district surveyor in relation to the appellants suggested that, whatever might be the case with other public bodies, it could not have been intended that the London County Council should be under the obligation of giving notice to the district surveyor. But the district surveyor is not the servant of the county

council; he is an independent officer placed in the position which he occupies for the purpose of protecting the interests of the public generally, interests which may be affected by the erection of a building none the less because the builders happen to be the county council. Lastly it was contended that, apart from the fact that the builders in the present case are the county council, the mere fact that the building is a public elementary school is sufficient to exempt it from the operation of the London Building Act by reason of the necessity of its complying with the building regulations of the Board of Education. It was suggested that the inconvenience which would arise if two public authorities had concurrent jurisdiction over the erection of a building, with power to give possibly conflicting directions with respect to it, points to the conclusion that the general jurisdiction of the district surveyor was not intended to include the particular class of buildings which was under the special control of the Board of Education. This argument as to the conflicting jurisdiction of different public authorities has been addressed to us in other cases, where it was sought to exclude from the supervision of the district surveyor certain structures which were required to comply with the regulations of the Postmaster-General, the Board of Trade, and other public bodies; but there is no valid reason why a building should not comply with both. For the reasons I have given I think that the appellants ought to have served a building notice on the district surveyor, and that the decision of the magistrate must be affirmed.

DARLING and JELF JJ. concurred.

Appeal dismissed.

Solicitor for appellants: *Edward Tanner.*

Solicitors for respondents: *Hicklin, Washington & Pasmore.*

J. F. C.

C. A. 1909 *Feb.* 8, 9, 10; *March* 22.

Considered. HARRISON *v.* NAT. COAL BOARD [1950] 1 K. B. 466

[IN THE COURT OF APPEAL.]

DAVID *v.* BRITANNIC MERTHYR COAL COMPANY.

Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 58), *s.* 49, *r.* 12—*Coal Mines Regulation Act*, 1896 (59 & 60 *Vict. c.* 43), *s.* 6—*Coal Mine—Negligence—Statutory Duty—Master and Servant—Common Employment.*

The duty thrown on a mine-owner by the general rules as to the use of explosives in a mine contained in the Coal Mines Regulation Acts, and the special statutory rules made thereunder, is an absolute duty, and not merely a duty to take all reasonable means, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, to prevent their contravention.

The plaintiff brought an action for damages for the death of her husband through an explosion in the plaintiffs' mine caused by the firing of a shot in contravention of the rules under the Coal Mines Regulation Acts. It was proved that the explosion was caused by the shot, and that serious breaches of the rules had been committed in firing it; but these breaches were committed without the knowledge of the defendant company, and there was no evidence that they had been guilty of any personal negligence, or that they had or had not properly published the rules and done all that was reasonably possible to prevent their contravention:—

Held by Fletcher Moulton and Buckley L.JJ. (Cozens-Hardy M.R. dissenting), that the defendant company were civilly liable for breach of the duty imposed upon them by the Coal Mines Regulation Acts with regard to the use of explosives in the mine without proof of negligence.

THIS action was brought by the widow of William David, who was killed by an explosion in the defendant company's mine on December 14, 1907, on behalf of herself and his children, to recover damages from the defendant company for breaches of their statutory duty under the Coal Mines Regulation Acts, 1887 and 1896, and negligence, whereby the explosion occurred. William David was working as a repairer for the plaintiff company in their colliery at the time of the explosion, several other men were killed by the same explosion, five other actions had been brought by their relatives against the company, and it had been agreed that this should be taken as a test action and the others should abide its result. The regulations, some of which were alleged to have been broken, were contained in (*a*) the Coal

Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), s. 49, r. 12, which enacts certain general rules for the use of explosives in all mines, of which those in question are set out below (1); (*b*) special rules for the guidance of managers and employees in the particular mine of the company, issued under s. 51 of the same Act as extended by the Coal Mines Regulation Act, 1896, s. 1 (*b*), (*c*), and (*d*), and having statutory force; (*c*) an order made by the Secretary of State in exercise of a power given by the Coal Mines Regulation Act, 1896 (59 & 60 Vict. c. 43), s. 6, for regulating the use of explosives in mines, by which the use of

(1) Sect. 49, r. 12: "(*f*) In any place in which the use of a locked safety lamp is for the time being required by or in pursuance of this Act, or which is dry and dusty, no shot shall be fired except by or under the direction of a competent person appointed by the owner, agent, or manager of the mine, and such person shall not fire the shot or allow it to be fired until he has examined both the place itself where the shot is to be fired and all contiguous accessible places of the same seam within a radius of twenty yards, and has found such place safe for firing:

"(*h*) If the place where a shot is to be fired is dry and dusty, then the shot shall not be fired unless one of the following conditions is observed, that is to say—

"(1.) Unless the place of firing and all contiguous accessible places within a radius of twenty yards therefrom are at the time of firing in a wet state from thorough watering or other treatment equivalent to watering, in all parts where dust is lodged, whether roof, floor, or sides; or

"(2.) . . . . unless the explosive is so used with water or other contrivance as to prevent it from inflaming gas or dust, or is of such a nature that it cannot inflame gas or dust.

"(*i*) If such dry and dusty place is part of a main haulage road, or is a place contiguous thereto, and showing dust adhering to the roof and sides, no shot shall be fired there unless—

"(1.) Both the conditions mentioned in sub-head (*h*) have been observed; or

"(2.) Unless such one of the conditions mentioned in sub-head (*h*) as may be applicable to the particular place has been observed, and moreover all workmen have been removed from the seam in which the shot is to be fired, and from all seams communicating with the shaft on the same level, except the men engaged in firing the shot, and such other persons, not exceeding ten, as are necessarily employed in attending to the ventilating furnaces, steam boilers, engines, machinery, winding apparatus, signals, or horses, or in inspecting the mine:"

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

gunpowder was forbidden in this particular mine. It was found that the explosion was caused by firing a shot, and that, in firing it, the following among other breaches of the rules were committed. It was not fired by the regular shot-firer, though one had been duly appointed, but by two fellow workmen of the deceased; it was fired in a main haulage road, being a dry and dusty place, without any watering or spraying of the dust; the men were not properly withdrawn, and gunpowder was used. Other breaches were alleged, but the case turned upon the question what liability was thrown by the Act upon coal-owners for the acts of their servants, which depended mainly upon s. 50 of the Act of 1887. (1)

The plaintiff did not give any evidence that the company had neglected their duty of enforcing the rules, and as Channell J. had intimated that he should rule that the company was not liable if they had done their best to enforce the rules, and that the burden was on the plaintiff to prove they had neglected to do so, the company did not call any special evidence at the trial to prove that they had taken all reasonable means for enforcing the rules and regulations and to prevent any contravention thereof or non-compliance therewith. Channell J. in summing up directed the jury that the duty which the statute imposed upon mine-owners in respect of the performance of the statutory rules was that they were first of all to publish the rules, and in the next place to enforce those rules to the best of their power, and that if they did enforce to the best of their power the rules, as rules for the working of the mine, then they were not responsible if one of their servants committed a breach of the rules and thereby caused damage to another servant; he further directed them that it was the duty of the plaintiff

(1) Sect. 50: "Every person who contravenes or does not comply with any of the general rules in this Act, shall be guilty of an offence against this Act; and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

to give evidence that the mine-owners neglected their duty of enforcing the rules. He left to the jury the questions (1.) whether the accident was caused by a shot fired by the two fellow workmen, Jenkins and Evans, in contravention of the rules; (2.) whether contravention by Jenkins and Evans was brought about by the defendants not taking reasonable means to prevent such contravention by enforcing the rules to the best of their power. The jury answered the first question in the affirmative and the second in the negative. Judgment was on those findings entered for the defendants, and the plaintiff appealed.

Sir R. Finlay, K.C., *Abel Thomas, K.C.*, *J. Sankey*, and *Clive Lawrence*, for the appellant. If an offence has been committed by disregarding the statutory provisions of the Coal Mines Regulation Acts an action for damages can be maintained against the owner, unless he can shew within the wording of s. 50 of the Act of 1887 that he has taken all reasonable steps to procure obedience to the rules. If an offence has been committed by any one, then an offence has been committed by the owner, unless he proves that he has taken all reasonable means to enforce obedience to the rules and mine regulations made in pursuance of the rules. Here an offence has been committed by the owners, and no evidence was called by them at the trial to shew that they had taken any precaution to enforce the rules. Therefore it is clear a statutory breach of the Coal Mines Regulation Acts has been committed, and a breach of a statutory duty does away with the defence of common employment: *Groves* v. *Lord Wimborne*. (1) The law as to the nature and onus of proof was wrongly stated to the jury by Channell J.

[The Coal Mines Regulation Act, 1887, s. 49, r. 12 (*f*), (*h*), (*i*), ss. 50, 51, 52, and the Coal Mines Regulation Act, 1896, s. 1 (*b*), (*c*), (*d*), and (*e*), were cited. Also the special rules applicable to this particular colliery were cited and criticized.]

There have been some six statutory breaches of duty. (1.) The shot was fired by some one other than the proper shot-firer. (2.) Gunpowder was used here, and it is not one of the permitted explosives for this mine. (3.) No sprayers were used to damp this

(1) [1898] 2 Q. B. 402.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

dry and dusty part of the mine. (4.) No electrical appliances for firing the shots were provided. (5.) There was no safety fuse. (6.) The men were not properly withdrawn from the seam.

On the facts an offence has been committed by the owners of the mine as well as by the men.

The defendants have not discharged the onus laid upon them by the Acts of shewing that they have done all in their power to enforce obedience to the rules and that they are in no way blamable for not enforcing the rules. The defendants, therefore, are liable, and the direction of Channell J. on this point was wrong, and there must be a new trial.

B. Francis-Williams, K.C., *Eldon Bankes, K.C.*, and *Trevor Lewis*, for the respondent company. There was no evidence of any mismanagement of the mine by the company. The accident was caused by an isolated instance of carelessness on the part of a man who was not the shot-firer.

There is a difference between the liability of an owner under the Factory Acts, as in *Groves* v. *Lord Wimborne* (1), and his liability under the Coal Mines Regulation Acts, under which he is compelled to appoint certain statutory substitutes, such as the manager, the engineer, and the shot-firer, over whom, except by dismissing them, he has no control; but the mine-owner is not liable for the negligence of one of these appointed substitutes: *Howells* v. *Landore Siemens Steel Co.* (2) This being a common law action for negligence or for the breach of a statutory duty, the plaintiff must bring some evidence to prove negligence or breach of duty on the part of the mine-owners.

The jury have found as a fact that the accident was not due to anything left undone by the mine-owners. There are two classes of duties imposed upon owners of coal mines by the Coal Mines Regulation Acts and the rules made thereunder: the one, to be performed directly by the owner; the other, duties to be performed by some one else, for breaches of which the owner is made liable to a fine unless he has taken all reasonable means to ensure their performance. The distinction is recognized by s. 65, which provides that only an inspector can institute a prosecution against an owner for

(1) [1898] 2 Q. B. 402. (2) (1874) L. R. 10 Q. B. 62.

offences not committed personally by him. Examples of duties thrown directly upon the owner are to be found in s. 16, which forbids the employment of any one in a mine unless there are two shafts, ss. 37 and 38, which provide for fencing the shafts and depositing plans of the workings of an abandoned mine, and s. 57, which provides for the publication of rules. All these are in marked contrast to the provisions as to underground workings contained in the general rules imposed by s. 49 and the special rules made in pursuance of the Act for this group of collieries. The whole scheme of the rules is to withdraw from the underground management and control all but competent specially appointed men. A manager, under-manager, overman, and shot-firer are to be appointed. Their duties are defined, and the owner has no power to interfere unless he is himself manager. Sect. 50 has primarily to do with penalties, not damages, but it shews that the only duty thrown on the owner is to take reasonable means to prevent breaches of the rules.

Howells v. *Landore Siemens Steel Co.* (1) is a direct authority that common employment is a defence in this class of cases.

Sir R. Finlay, K.C., in reply.

Cur. adv. vult.

March 22. COZENS-HARDY M.R. This appeal raises a question of great importance and of no little difficulty as to the liability of the owner of a coal mine towards one of his colliers injured by an accident in the mine due to a breach of the statutory rules by which the working of the mine is governed.

The facts are not really in dispute having regard to the findings of the jury. The plaintiff is the widow of a collier who was killed on December 14, 1907, in the Dinas Main Colliery, of which the defendants are the owners. The action is based on alleged breach of statutory duty and negligence on the part of the defendants. The defendants plead that the breach of statutory duty (if any) was committed by, and the negligence (if any) was that of, a fellow servant of the deceased, and they rely upon the defence of common employment.

The action was tried before Channell J. and a special jury, and

(1) L. R. 10 Q. B. 62.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Cozens-Hardy M.R.

the jury found (1.) that the accident was caused by a shot fired by Jenkins and Evans, two fellow workmen, in contravention of the rules, and (2.) that such contravention by Jenkins and Evans was not brought about by the defendants not taking all reasonable means to prevent such contravention by enforcing the rules to the best of their power. Upon these findings the learned judge ordered judgment to be entered for the defendants. The learned judge had previously directed the jury that the duty which the statute imposes upon mine-owners in respect of the performance of the statutory rules is that they are first of all to publish the rules, and in the next place to enforce those rules to the best of their power, and that if they do enforce to the best of their power the rules as rules for the working of the mine, then they are not responsible if one of their servants commits a breach of the rules and thereby causes damage to another servant. In other words, he held that the statute does not impose an absolute duty upon the owners to ensure and assure compliance with the rules by their servants. The plaintiff has appealed and claims either judgment or a new trial on the ground of misdirection.

The principles of law which ought to govern this case do not seem to be open to serious doubt, although the application of those principles presents to my mind very great difficulties. The principles may be shortly stated thus: A master is not liable to one servant for the consequences of an accident caused to that servant by the negligence or breach of statutory duty of another servant. This is often spoken of as the doctrine of common employment. But, on the other hand, a master is liable to his servant for the consequences of an accident caused to that servant by the breach of a statutory duty imposed directly and absolutely upon the master, and the master cannot shelter himself behind another servant to whom he has delegated the performance of the duty. In such a case the negligence is the master's negligence, and the doctrine of common employment has no application: *Groves* v. *Lord Wimborne*. (1)

Before considering the Act of 1887, by which the working of coal mines is regulated, it is necessary to state that neither

(1) [1898] 2 Q. B. 402.

Jenkins nor Evans was the authorized shot-firer, and, moreover, that the shot was fired in a main haulage road without removing the plaintiff's husband and other colliers from the neighbourhood. It is probable, although there is no finding on the point, that an improper and non-permitted explosive was used in firing the shot.

The Act of 1887 is an elaborate code regulating the mode of working a coal mine and the duties of the numerous persons employed at the mine. In addition to thirty-nine general rules contained in the body of the Act, there are 247 special rules applicable to the present mine, which have equal statutory effect with the general rules. It is plain that many sections of this Act impose a direct duty upon the owner. Provision is made in ss. 4 to 7 as to the employment of boys, girls, and women. Sect. 8 provides that the owner, agent, or manager shall keep a register of boys, girls, and women; and s. 9 enacts that if "any person" contravenes or fails to comply with or permits any person to contravene or fail to comply with any of the provisions in the prior sections he shall be "guilty of an offence against this Act; and in the event of any such contravention or non-compliance by any person whomsoever the owner, agent, and manager shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the provisions of this Act to prevent the contravention or non-compliance." Now it seems to me that the "any person" commits one offence against the Act, and the owner also commits an offence against the Act, but not the same offence as that committed by "any person," and that the nature and extent of the owner's offence must be found in the neglect of the duty stated at the end of the section. Precisely similar observations apply to s. 11, which prohibits payment of wages in a public-house. Sect. 16, dealing with what I may describe as the standard arrangements of the mine, seems to impose direct obligation upon the owner. This applies also to s. 20, which requires the owner to appoint a certificated manager, and expressly exempts the owner from liability if he has taken all reasonable means to prevent the mine from being worked in contravention of the section. Sects. 33 and 34

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Cozens-Hardy M.R.

impose direct obligations on the owner as to working plans, &c. Sects. 37 and 38 impose obligations to fence upon the owner and no one else. Sect. 49 states general rules which are to be observed so far as is reasonably practicable in every mine. Some of these rules obviously impose obligations upon the working colliers—for example, r. 10 (4.); some upon inspectors—for example, rr. 4 and 5; some upon enginemen—for example, r. 24; some upon the owner—for example, r. 15. The particular rule the breach of which led to this accident is r. 12 (*f*), (*h*), and (*i*). I have already indicated the effect of these rules. Suffice it to say that they provide that no shot shall be fired except by a duly appointed shotman, or without certain special precautions. Sect. 50 is a very important section. It corresponds exactly with s. 9, to which I have referred, and also with s. 11, sub-s. 2. It deals only with penalties. It has no application to civil proceedings like the present. I repeat that in my view it does not make the owner guilty of the same offence as that of which the actual contravener of the rules is guilty, and I find the nature of the owner's duty by reference to the last words of the section. If the owner is himself guilty of contravening a rule imposing a duty directly and expressly upon the owner, he is hit by the first part of the section. Otherwise he is protected against penalties by the latter part of the section, which latter part defines the nature and extent of his obligation. Sect. 51 provides for special rules applicable to the particular mine, and sub-s. 3 is identical with s. 50, mutatis mutandis. The special rules are 247 in number. The manager has the responsible charge and direction of the colliery and the control of all officers and other persons employed (r. 3), and is to direct the places in which blasting is to be permitted (r. 8). No shot is to be fired except by the shotman (r. 195), who is to observe and obey the instructions of the manager as to the places and times for firing shots and the other regulations made by the manager in pursuance of r. 200.

Now the accident from which the deceased collier met his death was due to a shot fired by unauthorized persons. I cannot hold that an owner, who could not lawfully himself fire a shot or even direct the shotman when and where to fire a shot, can be

held guilty of the offence of firing such shot. In other words, I think this particular duty was imposed not upon the owner, but upon the shotman, and I agree with the view of Channell J. upon this point. That the owner had a duty I do not doubt, but there is no evidence that such duty was not discharged. It is remarkable that there is very little authority upon the point, but such as there is seems to me to help the respondents rather than the appellant. *Howells* v. *Landore Siemens Steel Co.* (1) was a case under the Act of 1872, which contains in ss. 51 and 52 provisions similar to those in the Act of 1887. The owners were held not liable to the representatives of a deceased collier who met with his death through the negligence of the manager, who was guilty of a breach of r. 6, the equivalent of r. 7 under the Act of 1887. It is true that the point which has been raised before us does not seem to have been taken, but I am unwilling to assume that the counsel who argued and the very eminent judges who decided that case overlooked a point which must have rendered a decision in favour of the owners wrong. Indeed Blackburn J. (2) remarks that r. 6 "is to be observed by the person for the time being in charge of the mine," i.e., by the manager and not by the owner. Unless the view which I have expressed as to the nature and extent of the owner's liability is correct, it seems to me that the owner, although able to defend himself against a penalty under s. 50 if he can prove that he has taken all reasonable means to prevent a contravention or non-compliance with the rules, has no such right in a civil action like the present. I shrink from this conclusion. I agree with the judgment of Channell J. and I think the appeal should be dismissed; but, as the majority of the Court think otherwise, the appeal will be allowed and a new trial directed.

FLETCHER MOULTON L.J. This action is brought by the representatives of a workman killed in an explosion in the Dinas Main Colliery for damages in respect of the accident. It is brought at common law, and not under the Employers' Liability Act or the Workmen's Compensation Act, and is based on the allegation

(1) L. R. 10 Q. B. 62. (2) Ibid. at p. 64.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Fletcher Moulton L.J.

that the accident arose from the breach by the defendants of certain duties imposed upon them by statute. The facts are very simple. The defendants are a limited company and owners of the colliery in question, which is situated in Wales. This colliery is, of course, subject to the provisions of the Coal Mines Regulation Acts, and, in addition to the general rules contained in those Acts, it is subject to certain special rules which have been drawn up in the manner prescribed by those Acts and have statutory force. Breaches of these rules were committed which undoubtedly led to the death of the workman. It is not necessary specifically to inquire into all the alleged breaches, and it will suffice to take the two principal ones—namely, that in blasting in the main haulage road of the mine a non-permitted explosive was used, namely, gunpowder, and that the shot was not fired by the shot-firer. The plaintiff alleges that these matters constitute breaches of statutory duty on the part of the defendants.

The defendants deny that the Acts and rules impose upon them any such statutory duties, and they further say that, inasmuch as the acts or omissions actually constituting the breaches of the statute were committed by fellow workmen of the deceased, the doctrine of common employment applies and constitutes a complete defence to the action. Both these defences raise points of great general interest and wide-reaching application. I prefer to consider first the latter of the two points, namely, whether the doctrine of common employment applies in a case where the action is based on the breach of a statutory duty on the part of the employer. For this purpose one must assume that the Acts and rules impose a duty on the employer. It is to my mind immaterial whether, if the duty be to perform an act, it is one capable of being done by the employer personally, or whether it is of such a kind that it must necessarily be performed by his servants or agents, or, if the duty be in the form of a prohibition, it is such that the disobedience will be personal or through his servants or agents. These points have, in my opinion, nothing to do with the question. In the case of a corporation, such, for instance, as a limited company, the acts must necessarily be done by

agents. The sole question to ask is whether or not the statute has imposed the duty on the employer, and for the purpose of this first question we must assume that this is the case.

This being so, I confess that the matter does not appear to me to be open to doubt. If by a statute a duty is laid on any person, every member of the public has the right to have that duty performed. The breach of it does not give to every member of the public a right of action, because damage is an essential part of such a cause of action, but it is settled law that where damage has accrued to any person through the breach of a statutory duty by another person the latter is liable. A workman, therefore, in common with the rest of the public, is entitled to the performance by his employers of their statutory duty, unless he has waived this right by accepting employment under them. Speaking for myself, I cannot see the slightest ground for contending that there is any such waiver, and I think it would be pessimi exempli to hold that such waiver follows from the acceptance of employment because a considerable proportion of the duties imposed by statute on employers of various kinds are directly intended to grant protection to workmen. Moreover, if we look to what is usually put forward as the basis of the doctrine of common employment, namely, that the risk of negligence on the part of a fellow workman is one of the risks accepted by the workman in taking the employment, it appears to me that it points to the same conclusion. The risk of an employer failing to perform a statutory duty incumbent upon him seems to me to be clearly not a risk that can be considered one of those which the workman must be assumed to have accepted. On the contrary, he in his position as a member of the public has a right to assume that his employer will fulfil the duties which the statutes impose upon him. But we are not left to decide this question only as a matter of principle. There is clear authority to the same effect. In the case of *Groves* v. *Lord Wimborne* (1) this Court decided that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of a duty imposed on the master. In that case the breach was the absence of fencing to

(1) [1898] 2 Q. B. 402.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Fletcher Moulton L.J.

certain cog wheels in a factory, and the facts of the case shewed that proper fencing had been put, but that it had for some reason been removed, and there had been no fence to the wheels for a period of about six months. This was held to be a breach of the provisions of s. 5 of the Factory and Workshop Act, 1878, which provides that machinery of the kind in question should be securely fenced. That case is, in my opinion, conclusive on the present point. There was in that case no suggestion of personal neglect or personal misconduct on the part of Lord Wimborne, the defendant. Both the original erection of the fencing and its maintenance were matters which he would naturally do through agents. But that did not prevent the obligation being one which was binding upon him or save him from being held liable for damage arising from the non-performance of a statutory duty. A suggestion was made during the progress of the argument that because the fencing was something which had to be erected it became obligatory on the owner of the factory in some special way as contrasted with obligations relating to the working of the factory. I can see no ground for importing any such distinction into the matter. Fencing must necessarily be removed occasionally to repair the machines. That for which the defendant was held liable was the absence of the fencing at the time when the accident occurred. This was in itself sufficient to support the action, and it was immaterial whether the fencing had never been erected or whether it had been properly removed and those working in the factory or in charge of it had omitted to replace it.

It follows, therefore, that our decision in this case must turn upon our answer to the question, Do the Coal Mines Regulation Acts, including the general and special rules made under them, and which have statutory force, impose on the defendants the duties the non-performance of which led to the death of the workman?

The question is one of extreme difficulty, in my opinion, owing to the peculiar drafting of the Act. It consists of enactments, partly of a positive and partly of a negative character, setting out things which must and things which must not be done in connection with coal mines. There is not, as a rule,

any specific statement as to the person to whom these enactments are directed. But we find many times repeated a provision that in case a particular direction is not complied with certain persons shall be "guilty of an offence against this Act." So characteristic is this of this particular piece of legislation that, in my opinion, it is not possible to arrive at an answer to the crucial question in this case until one has satisfied oneself of the exact meaning and effect of these words.

The primary object of the insertion of these provisions is unquestionably to lead up to the group of sections entitled "Legal Proceedings," which commence with s. 59. These prescribe, among other things, that a person who is guilty of an offence against the Act (not declared to be a misdemeanour) shall be punished with certain prescribed fines which may be recovered in the usual way before a Court of summary jurisdiction. There seems to be no restriction as to the persons who can institute such summary proceedings, save that in case of offences by an owner, agent, manager, or under-manager (not committed personally by them) the proceedings cannot be instituted save by an inspector or with the consent in writing of a Secretary of State. The amount of the fines (except where expressly prescribed, which seems rarely to be the case) is not exceeding 20*l.* in the case of an owner, agent, manager, or under-manager, and 2*l.* for any other persons, with a provision for a further fine of 1*l.* per day for continuing offences after written notice of the offence has been given by an inspector. But the most characteristic feature of all these enactments as to offences against the Act is that in almost every case the owner, agent, or manager may excuse himself by shewing that he had taken all reasonable means to prevent the commission of the offence. Perhaps the best example is to be found in s. 50, which deals with compliance with the elaborate scheme of general rules which are set out in s. 49, and which are from time to time issued in an amended form as progress is made in mining science. Sect. 50 prescribes as follows: "Every person who contravenes or does not comply with any of the general rules of this Act, shall be guilty of an offence against the Act; and in the event of any contravention of or

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Fletcher Moulton L.J.

non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance."

It is evident, therefore, that "an offence against this Act" is looked upon as something of a criminal nature rather than a civil obligation, inasmuch as it is characteristic of English law to enforce civil obligations without any consideration of the wilfulness or carelessness which has led to the breach, but to take these matters into consideration when criminal liability is being enforced. Such a consideration as this is, however, by no means decisive of the case, for it might be (as the learned judge in the Court below has held) that the statute only imposed on the owner, &c., the obligation to take reasonable care, in which case no breach would have been committed unless the breach of the rule was due to his not having taken such care. Nevertheless, taking these provisions as a whole, they appear to me to have nothing to do with civil liability, but solely with criminal liability, and unless we are prepared to hold that the enactments as to what is and what is not to be permitted in coal mines carry with them none of that civil liability which arises from the breach of a statutory duty, causing damage to a third person, we must, I think, come to the conclusion that a man may be guilty of a breach of a statutory duty imposed upon him under the Act without being, in the technical language of the Act, "guilty of an offence against the Act," and thus becoming liable to penal proceedings.

The civil liability arising from the breach of a statutory duty is of a wholly different nature from a penalty for such breach. The former gives no cause of action unless damage to a third party follows from it, and then it, in general, gives ground for an action for the amount of such damage at the suit of such third party. But penalties for breaches of statutory duties apply whether damage has been caused or not. Their very object is to punish the act itself and thus prevent its commission, whether

damage follows or not, so that the public and the workman may not be exposed to the risk arising from such forbidden acts. Persons engaged in these dangerous occupations are only too apt to take the chance of no harm coming from such acts, and no doubt in many cases they are not followed by disaster. But they are full of danger, not only to property, but also to life, and therefore their commission must be prevented by legislation of a penal character. Accordingly the penalty is not dependent on the amount of damage caused, nor does it go to the person suffering that damage. These two remedies are thus of so different a nature that it would be surprising to find that the Legislature had confined itself to the latter in cases where the Act is clearly aimed at bringing about a proper management of mines which may otherwise become a danger not only to the lives and property of strangers, but to the lives of the workmen employed. The Legislature would not interfere unless it intended to make something a statutory duty, and if the case was so clear that it felt it right to make it a statutory duty, it is unlikely that it would confine itself to the imposition of a penalty to the exclusion of civil liability, though it might well avail itself of the cumulative means of enforcing the duty given by the imposition of a penalty for the mere doing of the forbidden act or omission of the enjoined precaution, while there is nothing inconsistent in its allowing a person to save himself from the stigma of a criminal conviction by shewing that there was no personal misconduct on his part.

The view that these criminal provisions are quite apart from the question of statutory duty is greatly strengthened by the examination of parallel legislation, such, for instance, as the Factory Acts. Take for example the Factory Act, 1878. There we find repeatedly provisions as to what shall and what shall not be done in a factory, and factories in which they are done are said to be "not in conformity with" the Act. For keeping a factory which is "not in conformity with" the Act there are penalties recoverable by summary process, and in certain cases the owner can defend himself by proving that the act was done by some one of his employees. But this Court has decided that these penalties do not constitute the whole consequences of a

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Fletcher Moulton L.J.

non-performance of the duties created by the Act. They are only the criminal consequences of such non-performance. The civil liability due to damage having resulted to a third person from the non-performance of a statutory duty of this kind was the cause of action which was enforced in this Court in the case of *Groves* v. *Lord Wimborne*. (1) The gravamen there was the non-maintenance of fencing to machinery. This rendered the factory one "not in conformity with" the Act, and for this a penalty was provided. But nevertheless Lord Wimborne—although it was a matter of which he personally would have no knowledge—was held liable for damages suffered by a third person.

I come, therefore, to the conclusion that, although every "offence against the Act" for which a penalty is provided undoubtedly constitutes a breach of a statutory duty, the converse is not necessarily the case, and there may be statutory duties under the Act the breach of which is not made an "offence under the Act" so as to be mulcted by a penalty; and further—a conclusion that has a more direct bearing on the questions in this action—that statutory defences to proceedings of a criminal nature in respect of "offences under the Act" are only defences to such proceedings, and are not statutory defences in civil proceedings based on the non-performance of the statutory duty. Penalties are not in lieu of civil liability; they are additional to and independent of it.

It follows, therefore, that in my opinion the learned judge misdirected the jury in telling them that "there is not in this statute an absolute liability upon the owners to ensure compliance with these rules by their servants, but if they, to the best of their power, do their best to enforce these rules, then they are not liable in law for damage done by reason of their servants not performing the rules." I hold that in the rules which form part of this Act there are many statutory duties imposed on the owners of the mines, and that with regard to these there is no exception to the ordinary rule that civil responsibility follows if these rules are broken and damage is occasioned to third parties, whether the actual act or default is

(1) [1898] 2 Q. B. 402.

due to the owner or his servants or agents. If by its special Act a canal company is forbidden to keep the water at a higher level than that prescribed in the Act, it is no defence in a civil action to say that the disobedience was due to the negligence or misconduct of the servants employed to manage the sluices. Similarly, in the present case, if acts are done in the mine in contravention of the Act and damage ensues, the owners must in ordinary cases be liable for the consequences. I do not say that in every case the fact that the damage was due to the act of a servant would be sufficient to make the employer liable, for it might be an act wholly outside the work for which he was employed, and therefore would be much in the same position as the mischievous act of a stranger. For instance, if a boy employed in driving trams were to fire a shot that had been prepared for the shot-firer, he would not do so as the servant of the owner. But although there may be such exceptional cases, and although the facts of this case may actually give rise to questions of this kind, it seems to me that breaches of the rules are here alleged which, if proved, must entitle the plaintiff to succeed. The best example, to my mind, is the allegation that a non-permitted explosive, namely, black gunpowder, was used. The general rules in force at the date of the accident are perfectly explicit on the point that gunpowder must not be used in the mine in the places where these shots were fired, and I hold that, if it is proved that it was in fact used in the defendants' mine and caused the explosion by which the deaths ensued, the defendants, as owners of the mine, are responsible civilly. It was the servants employed by them to do the blasting who used the forbidden explosive, and although the defendants did not personally know of or permit the infraction of the rule, they must be responsible for the acts of the servants or agents by whom they carried on their mine.

I have not thought it necessary to examine at length the special rules. I see nothing in them which clashes with or abrogates anything contained in the general rules or the clauses of the Act, and I should be slow to attribute any such effect to them, even if at first sight they appeared to raise difficulties. Their object is only to work out and apply the principles of the

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Fletcher Moulton L.J.

Act and general rules in the circumstances of the particular colliery. They accordingly go into greater detail, but they do not contain anything which, to my mind, affects the decision in the present case.

It is suggested that such an interpretation of the statute as I adopt makes it impose an extraordinary and intolerable burden on the owners of mines, seeing that it renders them civilly liable for the misconduct of their servants. I can see nothing abnormal in this. So far as third persons are concerned, it is the ordinary law. Except in one important particular (with which I will deal later on), the effect of this view of the statute is that breaches of its provisions become statutorily equivalent to negligence, and this appears to me to correspond precisely with the history and object of such legislation. It has often been pointed out that such legislation aims only at imposing on all that which prudent and considerate employers will do of their own accord. By embodying in the provisions of an Act, such as the one now under consideration, those precautions which it is advised should be observed in the management of these dangerous undertakings the Legislature erects a standard of carefulness and requires all who carry them on to come up to that standard. It no longer is left to the chance opinion of a jury to decide whether these precautions may properly be omitted. The Legislature decides the question for them, and accordingly non-compliance with the provisions of the statute carries with it the same civil consequences that a verdict of negligence would do. There is, however, one respect in which my interpretation of the Act increases the burden of the employer. It makes him liable for the consequence of this statutory negligence (if I may use such a phrase) even towards his own servants, whereas the doctrine of common employment would save him from this liability in a case of common law negligence. Here again the interpretation appears to me to lead to no unreasonable consequences. Whether one approves or regrets the invention of the defence of common employment by the Courts early in the last century, it is certain that the trend of legislation has been to do away with it so that at the present time it has but little effect in the case of most forms of employment. But long before the more recent

legislation on this point, our industrial legislation as to factories mines, &c., has been markedly in the direction of insisting upon an employer doing his duty towards his workmen, at least to the extent of a standard fixed by the law, and it seems to me both reasonable and to be expected that the Legislature should make the breaches by him of the laws passed with this intent entail the like civil liability towards his own servants that they would towards third parties. This is all that my interpretation of the statute leads to, and I think, therefore, that there is no ground for suggesting that it lays any undue or abnormal burden on those who for profit own and work these dangerous undertakings.

I am therefore of opinion that this appeal should be allowed and a new trial ordered on the ground of misdirection.

BUCKLEY L.J. In each of these actions the writ is indorsed for damages for injuries received by the negligence of the defendants or their agents or servants, but in the one action in which a statement of claim has been delivered the claim is for damages for the defendants' breaches of statutory duty, and secondly for negligence. It is upon the former of these, namely, breach of statutory duty, that this appeal falls to be determined.

In my opinion s. 49 of the Coal Mines Regulation Act, 1887, creates a statutory duty in the owner personally and not only in those employed by the owner in the working of the colliery. As regards certain of the matters mentioned in that section I think this is plain. I may refer by way of illustration to r. 6, as to the fencing of entrances, and rr. 18 and 19, as to the fencing of shafts. These rules relate to construction and are analogous to the corresponding obligations under the Factory and Workshop Act, 1878, which were the subject of the decision of this Court in *Groves* v. *Lord Wimborne*. (1) Sect. 49 includes other acts which relate not to construction, but to operations to be performed from day to day in the course of the working of the colliery. The Act and the rules, which have the effect of a statute, contain provisions compelling the owner to have what I

(1) [1898] 2 Q. B. 402.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Buckley L.J.

will call statutory substitutes, being persons competent in mining and holding proper certificates enabling them to control dangerous operations in mines. I assent to the argument that for certain purposes the statutory substitute, say the manager, is in acts of this class given by the Act and rules an authority which displaces even that of the owner, assuming the latter not to be a person competent in these matters. But it does not, I think, follow that even as regards acts of this class a duty is not by s. 49 cast upon the owner. Let me suppose that, both the owner and the certificated manager being present underground, the manager proposes to do an act in breach of the rules, or which the owner believes to be in breach of the rules, in a matter which is for the skilled manager. It may be, and I think it is, the fact that the manager and not the owner is in this state of circumstances master of the situation. But if he insists on doing the act and persists in pursuing such course of conduct, the duty lies, I think, upon the owner to dismiss him. Whence does this duty arise? From the fact that the owner is by s. 49 under a statutory obligation to comply with the general rules. Apart, therefore, from s. 50, I think that s. 49 creates a statutory duty in the owner to observe not some only but all of the rules therein contained; and I think this is a statutory duty in the owner towards the workman.

Further, the effect of s. 50, in my opinion, is that a breach of the rules by any person whomsoever is constituted an offence of the owner unless he proves that which is mentioned in that section. The language of s. 50 is perfectly plain. The person who breaks the rules is guilty of an offence, and in the event of an offence by any person whomsoever the owner is guilty of an offence unless he proves, &c. When the shot-firer in the present case fired the shot in breach of the rules the operation of the statute was that the owner had committed an offence, against whose consequences, however, he might defend himself by proving that which is mentioned in s. 50.

It remains, however, to consider, so far as s. 50 is concerned, whether that section is addressed only to rendering the owner liable criminally, with the result that he is liable to a penalty, or whether it extends also to create in him liability in a civil

action. In my opinion the section creates in the owner not the former liability only, but the latter liability also. The statutory duty created in the owner is one for the benefit of the workman. It is, I think, a duty towards the workman. It is true that for a breach the Act imposes a penalty, but it does not follow that the penalty is the only consequence of the breach. The penalty does not go to indemnify the workman, and the payment of the penalty does not satisfy the obligation towards the workman if the statute has created such an obligation. It was by such reasoning as this that this Court in *Groves* v. *Lord Wimborne* (1) held (and that was the first point which the Court determined) that under the Factory and Workshop Act, 1878, it was not the intention of the Legislature that the only remedy for breach of the statutory duty should be the proceeding for a fine, but that upon proof of a breach of that duty by the employer, with the result that an injury was thereby occasioned to the workman, there was shewn a cause of action in the workman. Exactly the same reasoning is, I think, applicable to the present Act.

When once the conclusion is reached that a statutory obligation is imposed upon the defendants for the benefit of the plaintiff, the doctrine of common employment can have no application. If the employer has committed towards the workman a breach of a statutory duty, it can be no answer to say that another servant of the employer was guilty of negligence. *Howells* v. *Landore Siemens Steel Co.* (2) is no authority to the contrary. That action was based upon negligence. The leave to move was based upon that ground, and the question of liability for breach of the statutory obligation was not raised.

Being of the above opinion, it follows, in my judgment, that there was in this case misdirection. The learned judge told the jury that it was for the plaintiff to give evidence that the owner neglected his duty of enforcing the rules. He dwelt upon the fact that the plaintiff had not adduced evidence of other shots fired in breach of the rules, or evidence that it was not uncommon for other people than the proper shot-firer to fire, and so on. In that view of the case he left to the jury, in my judgment, the wrong question. The proper question was

(1) [1898] 2 Q. B. 402. (2) L. R. 10 Q. B. 62.

C. A. 1909

DAVID v. BRITANNIC MERTHYR COAL COMPANY.

Buckley L.J.

not whether the contravention of the rules was brought about by the defendants not taking reasonable means to prevent it, but whether the contravention was brought about notwithstanding that the defendants had taken all reasonable means to prevent it. In other words, had the defendants taken all reasonable means to prevent the breach and yet had the breach taken place? The onus upon this part of the case was placed upon the wrong shoulders. The defendants had prima facie upon the language of the statute committed an offence under the Act. It was for them to adduce evidence to shew that they had a statutory defence, namely, that they had taken all reasonable means, &c., to prevent such contravention.

Under these circumstances the logical result would be that, inasmuch as the defendants did not call any evidence and there was no evidence upon which the jury, if properly directed, could have found for the defendants, judgment ought to be entered for the plaintiff. But I am impressed by the fact that the defendants elected to call no evidence after and consequent upon the ruling of the judge. Under these circumstances it is only fair that there should not be judgment for the plaintiff, but that there should be a new trial. I think, therefore, that there must be a new trial.

Appeal allowed.

Solicitors: *Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

J. R. B.

CARTWRIGHT, Appellant *v.* THE TOWN CLERK OF SHREWSBURY, Respondent.

1909
March 19.

Parliament—Franchise—Old Lodger List—Objection by Overseers—Duty of Overseers to appear—Direction by Revising Barrister to Overseers—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 22; *s.* 28, *sub-ss.* 9, 10, 11.

Where a person whose name is on the existing register of voters in respect of lodgings sends in a claim to the overseers to be entered on the next register in respect of the same lodgings, and the overseers, acting under s. 22 of the Parliamentary and Municipal Registration Act, 1878, enter his name on the list of persons so claiming, and add in the margin opposite his name the words "objected to," the overseers must appear by themselves or by some person on their behalf before the revising barrister in support of their objection, otherwise the revising barrister must retain the name on the list. If the overseers so appear, then by s. 28, sub-ss. 10, 11, they are not required to give prima facie proof of the ground of objection, and, unless the person objected to appears by himself or by some one on his behalf and proves that he is entitled, the revising barrister must expunge his name.

By s. 22, if the overseers "have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered" they shall add in the margin of the list opposite his name the words "objected to," and such person shall be deemed to be duly objected to.

Semble, a direction by a revising barrister to the overseers that in his opinion as matter of law they have such reasonable cause in cases where the parties are parent and son or master and servant, and that they must object in such cases, does not relieve the overseers of the duty of satisfying themselves in each case that they have such reasonable cause before making an objection.

Case stated by the revising barrister for the borough of Shrewsbury. The case was as follows:

At a court held on September 11, 1908, for the revision of the list of voters for the borough of Shrewsbury, the appellant claimed, as a person already on the lodgers' list on the existing register, that his name should be inserted in the lodgers' list for the Quarry Ward polling district (parish of St. Chad) in the borough.

The claim of the appellant, with the usual declaration attached thereto, was received by the overseers of the parish on or before July 25, 1908, and the appellant's name was included by them

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

in the list of persons so claiming, which list the overseers signed and published on or before July 31, 1908. Before signing and publishing the list the overseers objected to the claim of the appellant by adding in the margin of the list, opposite the appellant's name, the words "objected to."

When the list came on before me (the revising barrister) for revision at the court, the appellant did not appear personally, nor was any evidence of any kind given or tendered before me on his behalf; but it was argued on his behalf by the party agent who supported his claim, firstly, that under the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 9, I was bound to retain the appellant's name upon the list unless the overseers appeared by themselves or by some person on their behalf in support of their objection; secondly, that the ground of the objection was not stated; and, thirdly, that the objection was not, so it was alleged in argument, an objection by the overseers, but was one made by them by my instructions, and that the overseers had no reasonable cause for believing that the appellant was not entitled to be registered.

I decided against the appellant on all the above points. As to the first point, I so decided because it appeared to me that s. 28, sub-s. 9, of the statute is expressly made subject to the other provisions of that statute, and therefore to the provisions of sub-ss. 10 and 11 of the same section; and because the purpose for which sub-s. 9 requires the appearance of an objector is that he shall support his objection, which by sub-s. 10 it is unnecessary for overseers who have made an objection to do.

I decided the second of the above points against the appellant because it appeared to me that s. 22 of the statute has provided the form in which overseers shall make their objection in such cases as the appellant's; and has further provided that where the overseers have followed this form, as they did in this case, the person objected to shall be deemed to be duly objected to.

And I decided the third of the above points against the appellant because I was of opinion that, apart from the question of evidence or no evidence, I was bound by the concluding words of s. 22 of the statute to treat the objection made by the

overseers as an objection duly made; and further because no evidence of any kind was given or tendered in support of the allegations made in the argument as above stated; the party agent appearing on behalf of the appellant informing me that he declined to call any evidence, that he had advised the appellant not to appear, and that he rested the case solely upon the appellant's claim and the declaration attached thereto and upon the arguments above cited.

This third point appears to be that intended to be raised by the appellant's notice of appeal. Such notice, however, assumes facts of which, as before stated, no evidence was given before me, and, moreover, does not correctly state the grounds of my decision. And since the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), s. 42, only permits me to state the facts which according to my judgment have been established by the evidence in the case and which shall be material to the matter in question, I would venture to submit to the Court that it is not possible for me to state any facts which might raise the above point as one of law for decision by the Court; more especially as it now appears from the affidavits, other than my own, which were made respectively in support of and opposition to the rule for a mandamus (1), that if evidence on this subject had been given in the revision court, I might have had to decide upon a conflict of testimony. But should the Court be of opinion that it is open to me to do so, I would ask permission to state here the following facts which are within my own personal knowledge, and which, although no evidence of them was given before me in the revision court, are deposed to by me in my affidavit used in opposition to the rule for a mandamus. These facts are as follows: That at the close of the revision of the list for Shrewsbury by myself in the year 1907 I called the overseers' attention to their duty as laid down by the said statute in respect to objecting to the claims of persons appearing on the "old" lodger list and whom the overseers had reasonable cause to believe were not entitled to be registered. I then told the overseers that in my opinion as matter of law they had such

(1) The case was stated by the revising barrister in obedience to an order of the Court directing him to state a case.

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

reasonable cause in cases where the parties were parent and son or master and servant, and I told them that they must object in such cases, meaning that it was their duty to do so. I did not mean, nor have I any reason to suppose that the overseers understood me as meaning, that the overseers were bound to object even in cases where they knew or had reasonable grounds for believing that the claims were good. And I further told them that they might throw the odium and responsibility for their so acting on myself if they were attacked by any claimant or by any other person in consequence of their having made such an objection.

After deciding as above stated the points raised in argument on behalf of the appellant, I called upon him by name, but he did not answer, and I was informed by the agent that he was not present.

It appeared to me, therefore, that the objection being by the overseers, and the appellant not having proved by himself or by any person on his behalf that he was entitled on the last day of July, 1908, or at all, to have his name inserted in the list, I was bound under the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 11, to expunge the appellant's name from the list, which I accordingly did.

I also expunged from the list the names of twenty-nine other persons under the same circumstances mutatis mutandis, and for the same reasons as those above stated in the case of the appellant Cartwright. The names of the said persons appear in the schedule hereto, and I have consolidated the cases of these twenty-nine persons with that of the appellant.

If the Court shall be of opinion that my decision was wrong, the register is to be amended by inserting the name of the appellant Cartwright in the lodgers' list for the parish of St. Chad, polling district No. 1, and the names of the other appellants in the like list for the respective parishes and polling districts set opposite their names respectively in the schedule hereto. (1)

(1) Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 22: "Where a person is entered in respect of lodgings on the register of voters for the time being in force, and desires to be entered on the next register in respect of the same lodgings, he may claim to be

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

Sir R. B. Finlay, K.C. (*Lewis Coward, K.C.*, and *F. F. Daldy* with him), for the appellant. With regard to the first point so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the 25th day of July.

"The overseers shall, on or before the last day of July, make out a list of all persons so claiming, and if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered, or is dead, shall add in the margin of the list opposite his name the words 'objected to' or 'dead,' as the case may be.

"The lists so made out shall be signed, published, and otherwise dealt with in the same manner as the alphabetical lists mentioned in s. 13 of the Parliamentary Registration Act, 1843, and shall for the purposes of the Parliamentary Registration Acts be deemed to be lists of voters, and the provisions of the Parliamentary Registration Acts as to objections shall apply to such lists, and the persons against whose names the overseers have so written the words 'objected to' or 'dead' shall be deemed to be duly objected to."

Sect. 23: "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be prima facie evidence of his qualification."

Sect. 28, sub-s. 9: "Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection."

Sub-s. 10: "If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give prima facie proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to.

"An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list.

"The prima facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise, that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to."

Sub-s. 11: "If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to."

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

taken on behalf of the appellant before the revising barrister, inasmuch as the overseers did not appear in support of their objection, the revising barrister had no power to expunge the appellant's name from the list. The appellant claimed to have his name inserted in what is known as the old lodgers' list prepared by the overseers. Sect. 22 of the Parliamentary and Municipal Registration Act, 1878, deals with such claims. By clause 2 of that section the overseers have to make out a list of all the persons so claiming, and, if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered or is dead, shall add in the margin of the list opposite his name the words "objected to" or "dead," as the case may be. Clause 3 of the section applies to such list the provisions of the Parliamentary Registration Acts as to objections, and therefore ss. 17 and 39 of the Parliamentary Voters Registration Act, 1843, which enable any person on any list of voters to object to any other person on the list, or to oppose the claim of any person whose name is omitted from the list, are made applicable. The form of notice of objection is given in the Registration Order, 1895, Sched. 3, Form I. Clause 3 also makes the writing by the overseers of the words "objected to" against the name equivalent to a notice of objection with the grounds thereof given by a person on a list of voters. By s. 23 the declaration of a lodger claimant annexed to the claim is prima facie evidence of the qualification, and this prima facie evidence is not rebutted by the fact that the claimant is a lodger to his father: *Major* v. *Shrewsbury Town Clerk*. (1) Sect. 25 imposes a penalty for a false declaration. Sect. 28 deals with the duties and powers of a revising barrister. The three material sub-sections are sub-ss. 9, 10, and 11. By sub-s. 9 the revising barrister must retain the name of every person not objected to and also the name of every person objected to, "unless the objector appears by himself or by some person on his behalf in support of his objection." That is a general enactment applying to all objectors, whether overseers or not, and it provides that the name must be retained in either of two events—first, if there is no objection,

(1) [1909] 1 K. B. 348.

and, secondly, if there is an objection and the objector does not appear in support of it. The words which occur at the beginning of the sub-section, and also at the end of clause 1 of sub-s. 10, "subject as herein and otherwise by law provided," refer mainly, if not exclusively, to sub-ss. 3 to 7 of s. 28, which deal with certain special cases, and not to sub-ss. 10 and 11. Sub-ss. 10 and 11 are supplemental to sub-s. 9 and deal with the burden of proof and the consequences thereof where the objector has appeared in support of his objection. The opening words of sub-s. 10, "If the objector so appears," govern the whole sub-section and apply to an objector who is an overseer as well as to an ordinary objector; and then the sub-section provides that the objector, "unless he is an overseer," must give prima facie proof of the ground of his objection, and unless such proof is given the revising barrister shall retain the name of the person objected to. To cause sub-ss. 10 and 11 to come into operation at all the objector, whoever he is, must appear in support of his objection. It is especially desirable in a case like the present, where overseers have received what amounts to a direction to object, that the overseers should appear to support, and state generally the nature of, their objection, which, it is understood, is the usual practice. The overseer, if he so appears, need not give prima facie proof of the ground of his objection, inasmuch as by clause 2 of sub-s. 10 an objection made by overseers, which means overseers who have appeared in support of their objection, "shall be deemed to cast upon the person objected to the burden of proving his right to be on the list." This sub-section, which deals with the burden of proof after appearance, cannot be invoked as dispensing with appearance. Then by sub-s. 11, if such prima facie proof is given by the objector, or if the objection is by overseers, and if in either case the person objected to does not prove his right to be on the list, the revising barrister shall expunge the name. In the present case the overseers did not appear either by themselves or by some person on their behalf in support of their objection, and therefore sub-ss. 10 and 11 did not come into operation. Under sub-s. 9 the revising barrister was bound to retain the name on the list.

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

With regard to the second point, in one sense the overseers need not state the ground of their objection, because an objection by them is valid if they write the words "objected to" against the name. But in practice if overseers appear in support of their objection they either state or they can be asked to state the nature of their objection. The revising barrister's decision was probably right upon this point, but it has a bearing upon the first point, because, if overseers need not state the ground of their objection, it shews how important it is that they should appear in support of their objection.

With regard to the third point, s. 22 requires the overseers to make out a list of old lodger claimants, and, "if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered," to object to the name. The overseers must themselves have reasonable cause to believe that the name ought not to be on the list. That direction is also given in the Registration Order, 1895, Sched. 3, Form of Precept, par. 22. The overseers must not object simply because the revising barrister tells them to do so. The revising barrister misdirected the overseers in telling them that as matter of law they had such reasonable cause in cases where the parties were parent and son or master and servant. The fact that there is such a relationship is a matter which the overseers may take into account in deciding whether there are reasonable grounds for objecting to the name, but it is wrong to say that they must object in every case where such a relationship exists. The direction laid down a hard and fast rule, instead of leaving it to the discretion of the overseers in each case, and shews that the objection was not one really made by them and was therefore invalid. The decision of this Court in *Major* v. *Shrewsbury Town Clerk* (1) is inconsistent with the direction given by the revising barrister. It is impossible to say how far the direction influenced the overseers in making the objection, but it is important to have it decided whether such a direction is right. The decision of the revising barrister was therefore wrong, and all the names ought to be restored to

(1) [1909] 1 K. B. 348.

the list. [He also referred to *Pickard* v. *Baylis* (1) and *Nuth* v. *Tamplin*. (2)]

The respondent did not appear.

LAWRANCE J. The main question which is raised here, and which is decisive of the whole case, is whether an overseer, who makes an objection to a person who has sent in a claim and whose name has been placed on what is called the old lodgers' list, is bound to appear either by himself or by some one representing him at the revising barrister's court in support of his objection, or whether all that is necessary is that he should write in the margin of the list, opposite the name of the person, the words "objected to." It seems to me that by s. 28, sub-s. 9, of the Parliamentary and Municipal Registration Act, 1878, every objector, whether he is an overseer or not, is bound to appear in support of his objection, inasmuch as that sub-section provides that "subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection." Those words are as wide as possible, and no distinction is drawn in that sub-section between an ordinary objector, if I may so call him, and an overseer objector. But when in sub-ss. 10 and 11 the section proceeds to deal with the course to be pursued by the revising barrister when the objector appears in support of his objection, a distinction is at once drawn between the two. That seems to me to dispose of the whole of the case and makes it unnecessary to go into the other questions which were raised before the revising barrister. But I should like to add a word or two upon the third point, namely, whether this was a good objection by the overseers. That is a question which it is not necessary for us to decide, but I may say this. Before an overseer is entitled to object to a person who has sent in a claim as an old lodger, and whose name is entered on the list, he must, by s. 22, "have reasonable cause to believe" that that person is not entitled to be registered, and if he has such reasonable cause

(1) (1879) 5 C. P. D. 235. (2) (1881) 8 Q. B. D. 247.

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

Lawrance J.

he is to write the words "objected to" in the margin of the list opposite his name. The revising barrister in the present case, at the close of the lists for Shrewsbury in 1907, seems to have called the attention of the overseers to their duty as to making objections to the claims of persons appearing on the old lodgers' list and to have given them the following direction: "I then told the overseers that, in my opinion, as matter of law they had such reasonable cause in cases where the parties were parent and son or master and servant, and I told them that they must object in such cases." The plain meaning of that direction is that in every case of father and son or master and servant, no matter what information the overseers may possess, they have in law reasonable cause to believe that the claimant is not entitled to be registered and that they are to object. The effect of that direction would be to throw the burden upon every lodger, who happened to be a son or a servant of the landlord, of attending at the revising barrister's court to substantiate his claim, and to meet any objection which might possibly be made against his right to be on the register. That alone is sufficient to make it doubtful whether the overseers in the present case had reasonable cause to believe that the appellant was not entitled to be registered as required by s. 22. It is, however, unnecessary to decide that, because the first point is sufficient to decide this case. In my opinion the appeal must be allowed.

WALTON J. I agree. The appellant, who was entered on the existing register as a lodger, claimed to have his name entered on the next register as a lodger in respect of the same lodgings, and the overseers, acting under s. 22 of the Parliamentary and Municipal Registration Act, 1878, entered his name on what is known as the old lodgers' list, and then objected to the claim by writing the words "objected to" in the margin of the list, opposite the appellant's name; and there is no doubt that under that section the appellant must be deemed to have been duly objected to. The appellant, when sending in his claim to the overseers, duly made the declaration annexed to his claim, which by s. 23 is made prima facie evidence of his qualification to be on the register. When the list came before

the revising barrister and he came to deal with the claim, the overseers did not appear in support of the objection, but, notwithstanding that, the revising barrister considered the objection and came to the conclusion that he ought to strike the name off the list.

The first contention before the revising barrister was that under the provisions of s. 28, sub-s. 9, of the Parliamentary and Municipal Registration Act, 1878, the revising barrister was bound to retain the appellant's name upon the list, unless the overseers appeared by themselves or by some person on their behalf—which they had not done—in support of their objection. That is the main question which arises upon this appeal, and practically it is the only question which we have to determine. The answer to that question depends upon the construction of s. 28, sub-ss. 9, 10, and 11, of the Parliamentary and Municipal Registration Act, 1878. Sub-s. 9 is to this effect: "Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection." That is a general direction given to the revising barrister to retain the name of a person objected to by an overseer or by any other person, unless the overseer or other person appears either by himself or by some person on his behalf in support of his objection. The overseers in the present case did not appear in support of their objection. Therefore it would seem, taking that sub-section alone, that the revising barrister ought to have retained the appellant's name on the list and had no right to strike it off. The revising barrister, however, in his decision says that that sub-section must be read subject to the provisions of sub-ss. 10 and 11. I think that the three sub-sections are reasonably clear and naturally follow each other. By sub-s. 9 the name of the person objected to is to be retained on the list unless the objector appears. I cannot find anything in either sub.-s. 10 or sub-s. 11 which alters that so as to dispense with the appearance of the objector, whoever he may be, and which allows the revising barrister to expunge the name although the objector does not appear. It seems to me that the

1909

CART-WRIGHT v. SHREWSBURY TOWN CLERK.

Walton J.

words at the beginning of sub-s. 10 negative that contention and shew that sub-s. 9 stands absolutely untouched. The sub-section begins "If the objector so appears," and it then proceeds to state what is to be done when the objector appears; and sub-s. 11 seems to be merely consequential on sub-s. 10. Sub-s. 9 does not say "unless the objector not being an overseer appears"; nor does sub-s. 10 use the words "If the objector, not being an overseer, so appears." By sub-s. 10, if the condition as to appearance is fulfilled, then the revising barrister shall require the objector, unless he is an overseer, to prove the notice of objection and to give prima facie proof of the ground of objection. An overseer is not required to prove those things. Clause 2 of sub-s. 10 may seem at first sight to raise a difficulty, but it really does nothing of the kind. It enacts that "an objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list." That forms an essential step in the scheme of these sub-sections. The overseers, if they have objected and appeared in support of their objection, have done all that is required of them. They are not required to prove anything, and in such a case the burden of proving his right to be on the list is thrown upon the person objected to. We are asked to read this clause as if it ran "an objection made under this Act by overseers whether they appear or not." I see no reason for the insertion of those words.

Sub-s. 11 is in the following terms: "If such proof is given by the objector as herein prescribed, or if the objection is by overseers, then unless the person objected to appears by himself or by some person on his behalf, and proves that he was entitled on the last day of July then next preceding to have his name inserted in the list in respect of the qualification described in such list, the revising barrister shall expunge the name of the person objected to." That provision, when properly understood, works in with the other two sub-sections. The words "as herein prescribed" refer back to the provisions of sub-s. 10, and the words "or if the objection is by overseers" merely secure the privilege which sub-s. 10 gives to overseers of not being required to give evidence in support of an objection made by them. Sub-s. 11 means that if proof is given in accordance

with sub-s. 10 by the objector who is not an overseer, or if the objector is an overseer, then, unless the person objected to appears by himself or by some person on his behalf and proves that he is entitled, his name shall be expunged from the list. The sub-sections read naturally and clearly, and the effect is that overseers may object to a name by writing the words "objected to" in the margin of the list opposite the name, but, unless they appear either by themselves or by some one on their behalf in support of their objection, the objection falls to the ground, and the revising barrister cannot expunge the name, but must, under the provisions of sub-s. 9, retain the name as if it had not been objected to. The appeal therefore succeeds upon this point.

The second contention was that the ground of objection was not stated. If that means that the ground of objection must be stated in the overseers' written objection opposite to the person's name, that is clearly not necessary. If on the other hand it means that the overseers did not appear and so did not put themselves in a position to state what was the ground of their objection, if they were asked to do so, then it seems to me to be only another way of stating the first contention.

The third contention was that "the objection was not, so it was alleged in argument, an objection by the overseers, but was one made by them by" the revising barrister's "instructions, and that the overseers had no reasonable cause for believing that the appellant was not entitled to be registered." To my mind we cannot deal with that as a separate point. We have no materials before us which will enable us to say whether that contention is well founded or not. It is sufficient to say that by s. 22 the overseers must themselves, before objecting to a person whose name is on the list, have reasonable cause for believing that the person is not entitled to be registered. They may act upon the advice of the revising barrister as to the law, but they must themselves have reasonable cause for believing that the person is not entitled to be registered before writing the words "objected to" in the margin of the list opposite the name. If the overseers here wrote the words "objected to" in the margin opposite the appellant's name simply because they were told to do so by the revising barrister,

1909

CART-WRIGHT v. SHREWS-BURY TOWN CLERK.

Walton J.

without exercising their own minds upon the matter, that would not be a good objection. It is difficult to determine upon the facts whether the overseers acted upon their own discretion or whether they acted upon the direction of the revising barrister. The materials are insufficient to enable us to deal with this point.

The appeal therefore succeeds upon the first point.

JELF J. I am of the same opinion. The case lies within a very narrow compass and depends entirely upon the construction of s. 28, sub-ss. 9, 10, and 11, of the Act of 1878. The effect of those three sub-sections is, to my mind, perfectly clear. With regard to an objection made to a name on a list by what I may call an ordinary objector, that is, by a person who is not an overseer, before the person objected to can be put upon his defence and called upon to prove anything, three conditions must be complied with. First, there must be an objection properly made; secondly, the objector must appear before the revising barrister, either by himself or by some person on his behalf, in support of his objection; and, thirdly, the objector must prove that he gave the notice of objection, and he must give prima facie proof of the ground of his objection. With regard to an objection made by an overseer, there are only two conditions to be complied with before the person objected to is called upon to defend his right to be registered. First, the overseer must make an objection; and, secondly, he must appear before the revising barrister, either by himself or by some person on his behalf, in support of his objection. If both these conditions are fulfilled, then the person objected to must appear and support his claim. The opening words of sub-s. 9, "Subject as herein and otherwise by law provided," fit in with the rest of the section, and the wording of sub-ss. 10 and 11 shews quite clearly that the appearance of the overseer when he makes an objection is necessary, though when he has appeared the person objected to must then be prepared to prove that he is entitled. Therefore upon this point the decision of the revising barrister was wrong.

With regard to the direction which the revising barrister has told us that he gave to the overseers, I can well understand that

there may be many cases in which the relationship of parent and son and master and servant lead to improper lodger claims which ought not to be allowed to pass, and no doubt the intention of the revising barrister was to warn the overseers to be careful in the exercise of their discretion under s. 22, and not to let any claims as to which they had reasonable grounds for believing that they were bad to pass unopposed. But I think that the revising barrister here has gone too far in what he said to the overseers, though I can quite appreciate the fact that in order to keep the register pure he thought it desirable to give some warning to the overseers. (1)

1909

CART-WRIGHT v. SHREWSBURY TOWN CLERK.

Jelf J.

Appeal allowed.

Solicitors for appellant: *Lewis & Lewis.*

W. F. B.

THE KING *v.* THE LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

1909

March 23.

Police—Pension—Service in more than one "police force"—"Police force with a salary paid out of money provided by Parliament"—Royal Irish Constabulary—Determination of Proportions in which Pension payable—Mandamus to Treasury—Servants of Crown—Police Act, 1890 (53 & 54 *Vict. c.* 45), *ss.* 14, 33.

By s. 14 of the Police Act, 1890, "where a person has served in two or all of the following capacities—(i.) as a civil servant within the meaning of the Superannuation Act, 1887; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament; he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension . . . . Provided as follows . . . . (2.) The pension shall be payable from money provided by Parliament and from the police pension fund in such proportions as the Treasury may determine, regard being had to the period of service and the salary received in each capacity." By s. 33: "In this Act, unless the context otherwise requires . . . . the expression 'police force' means a force maintained by one of the police authorities mentioned in

---

(1) The Court made an order under s. 38 of the Parliamentary and Municipal Registration Act, 1878, for the payment of the costs of the appeal by the respondent, the town clerk, who had been named as respondent to the appeal.

1909

REX v. LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

the" Third Schedule to the Act. By s. 40 the Act is not to extend to Scotland or Ireland.

A member of the Royal Irish Constabulary, which was a force with a salary paid out of money provided by Parliament, removed from that force with the written sanction of the chief officer thereof to the police force of a county in England. Upon his retirement from this latter force he became, under the Police Act, 1890, entitled to, and was granted by the police authority of the county, a pension calculated upon the number of years of his approved service in both forces. The police authority of the county applied to the Treasury, under s. 14 of the Act, to determine the proportions in which the pension should be payable from money provided by Parliament and from the county police pension fund, but the Treasury refused to do so upon the ground that the Royal Irish Constabulary was not a "police force" within the definition in s. 33, as it was not maintained by any of the police authorities mentioned in Sched. III., and that therefore s. 14 did not apply. Upon an application by the police authority for a mandamus:—

Held that, as the Royal Irish Constabulary was the only police force in which the salaries of the members were paid out of money provided by Parliament, the context required that the expression "police force" in s. 14, clause iii., should have its ordinary meaning, and not the limited meaning contained in the definition in s. 33, and that therefore it included the Royal Irish Constabulary, and s. 14 applied; and that a mandamus would lie to the Treasury to determine the proportions in which the pension was payable under s. 14.

ORDER nisi to the Lords Commissioners of His Majesty's Treasury to shew cause why a writ of mandamus should not issue directed to them commanding them to determine pursuant to s. 14 of the Police Act, 1890, the proportions in which the pension granted to one F. R. C. Coleridge, lately chief constable of the county of Devon, should be payable from money provided by Parliament and from the police pension fund of the county.

On March 16, 1871, Mr. Coleridge passed as a cadet into the Royal Irish Constabulary, which was a police force in which the salaries of persons serving therein were paid out of money provided by Parliament. On January 17, 1892, when he was of the rank of district inspector, he removed from the Royal Irish Constabulary with the sanction of the inspector-general, who was the chief officer of that force, to the county of Devon police force upon his appointment as chief constable of that county, in which capacity he served until 1907, when he gave notice to the police authority of the county of his desire to retire. The police authority gave a certificate of thirty-five years' approved service,

namely, twenty years in the Royal Irish Constabulary and fifteen years in the county of Devon police, and he was granted a pension equal to two-thirds of his salary at the date of his retirement. The standing joint committee of the quarter sessions and county council of Devon applied to the Treasury under s. 14 of the Police Act, 1890, to determine the proportions in which the pension should be payable from money provided by Parliament and from the county police pension fund. The Treasury refused to do so upon the ground that s. 14 did not apply, as the Royal Irish Constabulary was not a "police force" within the definition of that expression in s. 33 of the Act, namely, a force maintained by one of the police authorities mentioned in Sched. III. to the Act. The above order nisi for a mandamus was accordingly obtained at the instance of the standing joint committee and the county council of Devon. (1)

(1) Police Act, 1890 (53 & 54 Vict. c. 45): Sects. 1 and 3 give every constable in a police force a right to a pension upon his retirement after having completed a specified number of years' approved service, the pension to be upon the scale contained in Sched. I. to the Act.

Sect. 4, sub-s. 4: "Where a constable has served in more than one police force in any part of the United Kingdom, approved service in any such police force in which he has completed not less than three years approved service, and from which he has with the written sanction of the chief officer of that force removed to another force, shall be reckoned as approved service in the force in which the constable is serving at the time of his retirement."

Sect. 14: "Where a person has served in two or all of the following capacities—(i.) as a civil servant within the meaning of the Superannuation Act, 1887; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament;

"he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension, and the pension shall be on the scale and subject to the statutory requirements affecting pensions in the service from which he last retires.

"Provided as follows—

"(1.) For the purposes of the pension three years of police service shall be reckoned as equivalent to four years of service as a civil servant, and conversely; and

"(2.) The pension shall be payable from money provided by Parliament and from the police pension fund in such proportions as the Treasury may determine, regard being had to the period of service and the salary received in each capacity."

Sect. 33: "In this Act, unless the context otherwise requires . . . .

1909

REX v. LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

Sir W. S. Robson, A.-G., and *Rowlatt*, for the Lords Commissioners of the Treasury, shewed cause. The Treasury have only power under s. 14 of the Police Act, 1890, to determine the proportions of the pension payable from money provided by Parliament and from the police pension fund where the person entitled to the pension has served in two or all of certain capacities, namely, (i.) as a civil servant; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament. By s. 33 "police force," unless the context otherwise requires, is defined as meaning a force maintained by one of the police authorities mentioned in Sched. III. The Act only relates to England, and the Royal Irish Constabulary is not a force maintained by any of the police authorities mentioned in the schedule, and it is therefore not a "police force" within the meaning of s. 14. The context does not require that a meaning other than that specified in s. 33 should be given to the expression "police force" in s. 14. Sect. 14, clause iii., is satisfied by the fact that there are certain superior officers in the metropolitan police, which is a "police force" within the definition in s. 33, as for instance the Commissioner of Police and the Receiver of the Metropolitan Police district, who are paid out of money provided by Parliament. In s. 4, sub-s. 4, the context requires that the expression "police force" should have a wider meaning than that given to it by the definition in s. 33, as it includes a police force in any part of the United Kingdom, and therefore includes the Royal Irish Constabulary, and that is sufficient to satisfy the words "unless the context otherwise requires" in s. 33. But the expression in s. 14 has the limited meaning placed upon it by s. 33, and therefore the Royal Irish Constabulary, though paid out of money provided by Parliament, is not a "police force" within s. 14. Nor are the officers of the Royal Irish Constabulary civil servants within the meaning of the Superannuation Act, 1887 (50 & 51 Vict. c. 67),

---

the expression 'police force' means a force maintained by one of the police authorities mentioned in" Sched. III.

By s. 40 the Act is not to extend to Scotland or Ireland.

The Royal Irish Constabulary is not a police force maintained by any of the police authorities mentioned in Sched. III.

so as to come within s. 14, clause i. By s. 12 of the Act of 1887 "civil servant" is defined as meaning "a person who has served in an established capacity in the permanent Civil Service of the State within the meaning of s. 17 of the Superannuation Act, 1859." Sect. 17 of the Act of 1859 (22 Vict. c. 26) is a negative section and does not include an officer of the Royal Irish Constabulary. Those Acts do not apply to the Royal Irish Constabulary. Therefore this is a casus omissus from the Act, which can only be supplied by legislation, and the Treasury have no power, however they may be willing to do so, to determine the proportions of the pension payable from money provided by Parliament and from the police pension fund.

Next, a mandamus will not lie to the Lords of the Treasury: *Reg.* v. *Lords Commissioners of the Treasury.*(1) If the supposed duty is imposed upon the Crown, a mandamus to perform that duty will not lie against the servants of the Crown. The ultimate object sought to be established here is to compel payment of a proportion of the pension out of money provided by Parliament, and a mandamus for that purpose will not lie against the Treasury. If the mandamus asked for is limited to a determination of the proportions payable out of each fund, then the above considerations may perhaps not be applicable.

Danckwerts, K.C., and *J. A. Hawke*, for the prosecutors. There is no police force in England, to which part of the United Kingdom the Police Act, 1890, alone applies, with a salary paid out of money provided by Parliament. There are only certain high officers of the metropolitan police, namely, the Commissioner and Receiver, who are so paid, and perhaps the assistant commissioners either wholly or in part. There are also certain constables of the metropolitan police so paid who are employed on special duties, as for instance in the dockyards, but they must be taken as being withdrawn for that purpose from the metropolitan police force and taken into the service of the Crown. Therefore only a very few officers in the metropolitan police are paid out of money provided by Parliament. It is not reasonable to suppose that the Legislature in enacting s. 14, clause iii., intended to make provision for those few officers, and the words

(1) (1872) L. R. 7 Q. B. 387.

1909

REX v. LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

of clause iii. shew that the Legislature intended to apply it to a police force the individual members of which are all paid out of money provided by Parliament. The Royal Irish Constabulary is a police force the salaries of the members of which are paid out of money provided by Parliament: Appropriation Act, 1907 (7 Edw. 7, c. 20), Sched. B, Part 7, No. 19. That is the only police force in the United Kingdom which is so paid, and it is clear that service in that force is to be reckoned for the purposes of pension: s. 4, sub-s. 4, of the Police Act, 1890; *Nott-Bower* v. *Mayor, &c. of Liverpool.* (1) Therefore the context in s. 14, clause iii., requires the expression "police force" to be construed in its ordinary and natural meaning, which will include the Royal Irish Constabulary, and not in the narrow sense defined in s. 33, as a force maintained by one of the police authorities mentioned in Sched. III. [Sect. 4, sub-s. 4, of the Police (Scotland) Act, 1890 (53 & 54 Vict. c. 67), was also referred to.]

Further, officers of the Royal Irish Constabulary who enter as cadets pass a competitive examination conducted by the Civil Service Commissioners, and they are appointed to the rank of district inspector by the Lord Lieutenant as representing the Crown. They hold their appointments direct from the Crown, and therefore come within the definition of "civil servants" in s. 17 of the Superannuation Act, 1859, though they are entitled to pensions under Acts which deal specially with the Royal Irish Constabulary, and not under the Superannuation Acts, 1859 and 1887.

As to a mandamus being the proper remedy, the mandamus asked for is not to direct the Treasury to pay a proportion of the pension, but merely to perform the statutory duty imposed upon them by s. 14 of the Act of 1890 of determining the proportions of the pension payable out of money provided by Parliament and out of the police pension fund, so as to make the section workable.

LORD ALVERSTONE C.J. In this case the Treasury have been asked to determine the proportions in which Mr. Coleridge's pension shall be payable from money provided by Parliament

(1) (1904) 68 J. P. 243.

and from the police pension fund of the county of Devon. In order to understand the question which has arisen it is necessary to bear in mind that the general object of the Police Act, 1890, is to fix the scale of pensions payable to police constables upon their retirement, and incidentally to determine by whom the pensions shall be payable. It is not disputed on the part of the Crown that Mr. Coleridge is entitled under s. 4, sub-s. 4, of the Act to have his service in the Royal Irish Constabulary reckoned as part of his approved service for the purpose of a pension. The question which has arisen is whether the Treasury can be called upon to determine what proportion of the total pension is to be paid from money provided by Parliament and from the police pension fund respectively, and the answer to that question depends upon s. 14 of the Act. The contention on the part of the Treasury is that, however much they may be willing to determine the proportions, they have no power to do so, because that section only gives them jurisdiction to determine the proportions where a person has served in two or all of the following capacities, namely, "(i.) as a civil servant within the meaning of the Superannuation Act, 1887; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament." I will first mention an argument that was addressed to us, namely, that Mr. Coleridge was a civil servant within the first of the above classes when he was in the Royal Irish Constabulary, and that therefore the section is applicable. I think it better not to pronounce any decision upon that point without giving the Crown further opportunity of considering it, and therefore I do not propose to decide it or to rest my judgment in any way upon it, though I do not say that that contention may not be right.

The main argument in the case turns upon the meaning of the expression "police force" in clause iii. of s. 14. If the contention on the part of the Treasury, that the expression "police force" in that clause is to have the narrow meaning given to it in s. 33, is right, it is impossible to see who are the persons contemplated as coming within that clause, except perhaps a very few individuals who are at the head of the metropolitan police. But this legislation was not intended to deal with any such special

1909

REX v. LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

Lord Alverstone C.J.

individuals. It is dealing with the case of the members of a police force generally becoming entitled to pensions. That being so, s. 33 gives a definition of a "police force," and we have to see whether that definition is to be read into s. 14. Sect. 33 provides: "In this Act, unless the context otherwise requires . . . . the expression 'police force' means a force maintained by one of the police authorities mentioned in the said schedule"; and the Royal Irish Constabulary is not a force maintained by any of the police authorities mentioned in Sched. III., which is the schedule referred to. It is said on behalf of the prosecutors that in s. 14 "the context otherwise requires," and that the expression "police force" is there used in its ordinary and natural meaning. It is not disputed that in s. 4, sub-s. 4, the expression "police force" must have a wider meaning than that given to it in the definition in s. 33, inasmuch as in that subsection it must include the Royal Irish Constabulary, and that is said on behalf of the Treasury to afford an instance in which the context requires the words to receive a meaning other than the meaning given to them by the definition clause. But in s. 4, sub-s. 4, the expression used is not merely "police force," but "police force in any part of the United Kingdom," and therefore, if the two expressions do not mean the same thing, s. 4, sub-s. 4, does not afford an instance of the context requiring a different meaning. When I remember that the Act deals with the pensions of constables generally, and that s. 4, sub-s. 4, contemplates the case of constables having served in a police force in any part of the United Kingdom, and if I am right in the view that, except in one or two individual cases, there is no instance of a police force with a salary paid out of money provided by Parliament except the Royal Irish Constabulary, it seems to me to be a reasonable view of s. 14, clause iii., that the words "with a salary paid out of money provided by Parliament" prevent the definition of "police force" in s. 33 from being imported into that clause. That being so, the words of the definition, "maintained by one of the police authorities mentioned in the said schedule," are not brought into clause iii. of s. 14. To my mind it would be a contradiction in terms to read clause iii. as speaking of "a police force maintained by one of the

police authorities mentioned in the said schedule with a salary paid out of money provided by Parliament," because there is, so far as I can see, no such force. I think, therefore, that the words "with a salary paid out of money provided by Parliament" are conclusive against the expression "police force" having the narrow meaning given to it in the definition clause. I have accordingly come to the conclusion that the Treasury are, under clause 2 of the proviso to s. 14 of the Act, bound to determine the proportions of the pension payable respectively from money provided by Parliament and from the police pension fund of the county of Devon, and I am fortified in arriving at this conclusion by the consideration that, if that is not so, there is no machinery at all for determining what proportion of the pension payable to Mr. Coleridge the county of Devon ought to bear.

With regard to the question whether a mandamus will lie, if this had been an application for a mandamus to order the Treasury to pay over part of a constable's pension, I do not think that it would lie. That seems to me to have been decided in more than one case. But here the Act simply imposes upon a public department the duty of determining the proportions which shall be payable from money provided by Parliament and from the police pension fund of the county, and therefore I think that a mandamus will lie in order to set in motion the procedure whereby alone the respective liabilities to pay can be determined.

The order must be made absolute.

DARLING J. I am of the same opinion. Sect. 14 of the Police Act, 1890, provides that "where a person has served in two or all of the following capacities—(i.) as a civil servant within the meaning of the Superannuation Act, 1887; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament; he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension." We must therefore ascertain if there is any definition of the expression "police force" in the Act. If there had been no definition of that expression there would have been no difficulty in the case. Sect. 33 gives a definition. "The expression 'police force' means a force

1909

REX v. LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY.

Darling J

maintained by one of the police authorities mentioned in" Sched. III. It is quite clear that s. 14 contemplates that a person may become entitled to a pension by serving partly in a police force where his salary is paid out of the police fund and partly in a police force where his salary is paid out of money provided by Parliament. If we look at Sched. III. we see that the various police authorities are described, but I cannot find that the salaries of any of the police forces which are maintained by those police authorities are paid out of money provided by Parliament. Accordingly the opening words of s. 33 apply, and the context requires that we should give a meaning to the expression "police force" in s. 14, clause iii., different from that contained in the definition in s. 33. Therefore in order to make s. 14 read sensibly we must give it the meaning contended for on behalf of the prosecutors. I agree that the order must be made absolute.

JELF J. I have felt some doubt about the construction of s. 14 coupled with s. 33 and Sched. III. of the Act, but I do not feel sufficient doubt to make me differ from the other members of the Court. With regard to the question of mandamus I am entirely of the same opinion as my Lord, that a mandamus will lie to direct this public authority to perform a statutory duty without which the statute is meaningless and unworkable.

Order absolute.

Solicitors for prosecutors: *Ford, Lloyd, Bartlett, & Michelmore, for H. Michelmore, Exeter.*

Solicitor for respondents: *Solicitor to the Treasury.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

1909

Feb. 3;
March 26.

JACKSON *v.* WATSON & SONS.

Damages—Breach of Warranty, Action for—Sale of Food—Warranty of Article as fit for Human Consumption—Death of Plaintiff's Wife through eating Food sold to him—Loss of Wife's Services—Death no Part of Cause of Action.

In an action for breach of a warranty that tinned salmon sold by the defendants to the plaintiff was fit for consumption as human food, the plaintiff claimed damages under the following head, among others, namely, on the ground that his wife having partaken of the salmon had in consequence died, and that, she having performed services for him in the care of his house and family until her death, he was under the necessity after her death of hiring some one else to perform such services. The jury found a verdict for the plaintiff and awarded 200*l.* in respect of the damages claimed as above mentioned :—

Held that, the death of the plaintiff's wife not forming an essential part of the cause of action sued upon, but only an element in ascertaining the damages arising therefrom, there was no rule of law which prevented such damages as aforesaid from being recoverable in the action.

Baker v. *Bolton*, (1808) 1 Camp. 493, considered and distinguished.

Appeal from the judgment of A. T. Lawrence J. in an action tried before him with a jury.

The action was for damages for breach of an implied warranty arising under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14, sub-s. 1, that tinned salmon sold by the defendants, who were grocers and provision merchants, to the plaintiff, was fit for human food. The statement of claim, after setting out the cause of action, alleged that the salmon was eaten by the plaintiff and his wife, and that, in consequence of eating the same, the plaintiff was rendered ill and his wife died; and, by way of damages, the plaintiff claimed for medical expenses and for the funeral expenses incurred by him in respect of his wife's burial, and alleged that, his wife having rendered services to him in the care of his house and family until her death, he was under the necessity, after her death, of hiring some one else to perform such services. The jury assessed the total amount of damages at 233*l.* 16*s.*, and, at the request of the learned judge, stated the items which made up that amount as follows: 4*l.* 3*s.* for medical

C. A. 1909

JACKSON v. WATSON & SONS.

expenses, 29*l.* 13*s.* for funeral expenses, and 200*l.* for loss of the wife's services through her death.

As will be seen, upon the argument of the appeal the only question raised was whether the last-mentioned sum of 200*l.* was recoverable, the warranty and the breach of it not being disputed, and no question being raised as to the 29*l.* 13*s.* for funeral expenses being recoverable.

The learned judge gave judgment for the total amount of the damages found by the jury.

Feb. 3. *Disturnal*, for the defendants. The plaintiff cannot recover damages in respect of the loss of his wife's services in futuro by reason of her death. This is not an action under the Fatal Accidents Act, 1846, the preamble to which goes far to shew that, except under that Act, no such damages as these could be recoverable in any form of action. The authorities clearly shew that such damages could not at common law be recovered in an action of tort, and it is submitted that the same rule must apply to an action for breach of contract. The general rule of law on the subject was laid down by Lord Ellenborough in *Baker* v. *Bolton* (1) as being that "in a civil Court the death of a human being could not be complained of as an injury." This rule was applied in *Osborn* v. *Gillett* (2) by the majority of the Court, and again in *Clark* v. *London General Omnibus Co.* (3) In the case of a servant death of course puts an end to the contract of service, and it is impossible to conceive of the damage from loss of service as continuing when the contract of service can no longer exist. Similarly, after the death of the wife, the husband cannot be regarded as wrongfully deprived of her services. The rule laid down by Lord Ellenborough is of general application, and there is no difference in this respect between an action of contract and one of tort. The principle is that the death of a person cannot at common law, and except so far as a statute has otherwise enacted, be made the subject of a claim for damages. The reasons for holding that loss of service after the death of the servant cannot be made the subject of damages

(1) 1 Camp. 493. (2) (1873) L. R. 8 Ex. 88.
(3) [1906] 2 K. B. 648.

are well expressed by Ritchie C.J. and Gwynne J. in *Monaghan* v. *Horn*. (1) [He also cited *Higgins* v. *Butcher* (2); *Langridge* v. *Levy* (3); *Heaven* v. *Pender* (4); *Randall* v. *Newson*. (5)]

Acland, K.C., and *B. C. Brough*, for the plaintiff. *Osborn* v. *Gillett* (6) and *Clark* v. *London General Omnibus Co.* (7) were actions of tort; so also, apparently, was *Baker* v. *Bolton*. (8) The rule laid down in that case by Lord Ellenborough is that the death of a human being cannot be complained of as an "injury." It is clear that what the learned Lord Chief Justice had in his mind was an action of tort in respect of the death. It is submitted that this rule does not apply to actions of contract. The preamble of the Fatal Accidents Act, 1846, clearly shews that the purview of that Act is confined to actions of tort, for it speaks of "wrongful act, neglect, or default," and no inference can therefore be drawn from it to the effect that, when in point of fact loss has been occasioned to one of two contracting parties by a breach of the contract by the other causing the death of a person whose life was of pecuniary value to the first-mentioned party, such loss cannot be made the subject of damages. The cases in reference to which the Fatal Accidents Act, 1846, was passed were cases where, the death of a person having been occasioned by a wrongful act or neglect, the rule "Actio personalis moritur cum persona" applied so far as the injury to the deceased was concerned, and there was no breach of any duty towards or infringement of any right of the surviving relatives. In *Clark* v. *London General Omnibus Co.* (7) the reasons for their judgments given by the different members of the Court differed to some extent, but the Lord Chief Justice seems to have based his judgment on the ground that it could not be said that there was any breach of duty towards the father whose daughter was run over, or any infringement of his rights. The same difficulty does not exist in this case, for there was admittedly here a breach of contract, and in point of fact the damage claimed for was

(1) (1882) 7 Canada Sup. Court R. 409.
(2) (1606) Yelv. 89.
(3) (1837) 2 M. & W. 519; (1838) 4 M. & W. 337.
(4) (1883) 11 Q. B. D. 503.
(5) (1877) 2 Q. B. D. 102.
(6) L. R. 8 Ex. 88.
(7) [1906] 2 K. B. 648.
(8) 1 Camp. 493.

C. A. 1909

JACKSON v. WATSON & SONS.

occasioned by that breach of contract. [They cited *Martin* v. *Great Indian Peninsular Ry. Co.* (1); *Meux* v. *Great Eastern Ry. Co.* (2); *Frost* v. *Aylesbury Dairy Co.* (3)]

Disturnal, for the defendants, in reply. It would be most anomalous if there were, in this respect, any such distinction between actions of tort and contract as is suggested.

Cur. adv. vult.

March 26. The following written judgments were read:—

VAUGHAN WILLIAMS L.J. This is an appeal against the judgment entered in the action of *Jackson* v. *Watson & Sons*, which was tried before A. T. Lawrence J. and a special jury. The action was for damages for breach of warranty on the sale of a tin of salmon, which was unfit for human food, and which caused the death of the plaintiff's wife. Alternatively the plaintiff claimed damages for negligence.

The statement of claim alleged that the plaintiff's wife, until her said death, rendered services to the plaintiff in looking after his house and family of seven children, and that by reason of her death the plaintiff had lost her said services, and would be put to expense in hiring persons to perform the said services.

The notice of appeal, which asks that the judgment for the plaintiff for 233*l.* 16*s.* and costs may be set aside and judgment entered for the defendants, is based upon the following grounds: 1. That the two sums awarded by the jury, namely, 29*l.* 13*s.*, the funeral expenses of the plaintiff's wife, and the sum of 200*l.* for damages for loss of the wife's services, are not recoverable in law. 2. That the sum of 25*l.* paid into Court by the defendants with their defence was sufficient to cover the sum of 4*l.* 3*s.*, the only other sum awarded by the jury. 3. That there was no evidence to go to the jury shewing that the plaintiff or his wife relied on the skill or judgment of the defendants as to the quality of the salmon sold so as to make the defendants liable.

The following were the questions put by the learned judge to the jury and their answers: Was the death of the plaintiff's wife caused by eating the tinned salmon?—Yes. Was the

(1) (1867) L. R. 3 Ex. 9. (2) [1895] 2 Q. B. 387.
(3) [1905] 1 K. B. 608.

salmon bought for food in such a way as to shew that the buyer relied on the seller's skill and judgment as to its fitness for the purpose of food?—Yes. Was the salmon unfit for food when sold?—Yes. What damages has the plaintiff sustained?—233*l.* 16*s.* the total.

The jury divided the 233*l.* 16*s.* as follows: 4*l.* 3*s.* medical expenses, 29*l.* 13*s.* for funeral expenses, and 200*l.* for pecuniary loss. The 200*l.* was based upon the loss of the wife's services and the necessity of employing extra servants by reason of the loss of the wife's services.

The ground of appeal based on the funeral expenses not being recoverable was abandoned before us, and the only question argued on the appeal was the question whether the plaintiff could recover damages for the loss of his wife's services. It was not suggested at the trial that the defendants had been guilty of any negligence, and the charge of negligence was expressly disclaimed by the counsel for the plaintiff. The action, therefore, was for breach of warranty and nothing else.

Lord Ellenborough in *Baker* v. *Bolton* (1) says: "In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence." It was argued before us that the above ruling of Lord Ellenborough had no application in an action for breach of contract, express or implied. *Baker* v. *Bolton* (1) was an action against the proprietors of a stage coach, on the top of which the plaintiff and his wife were travelling from Portsmouth to London, being passengers received by the defendants into the coach to be carried and conveyed from Portsmouth to London for reward to the defendants in that behalf (see the statement of claim as stated in Chitty on Pleading, 7th ed., vol. 2, p. 488). It is stated in the note on p. 488: "Damages in this case"—which, I think, means where the action is in tort and the declaration in case—"can only be recovered up to the time of the death of the plaintiff's wife," and *Baker* v. *Bolton* (1) is cited; and in the same note there is a reference to the form "in assumpsit ante 262." This

(1) 1 Camp. 493.

C. A. 1909

JACKSON v. WATSON & SONS.

Vaughan Williams L.J.

looks as if the author did not think that the observation of Lord Ellenborough applied in a case where the action was in form an action for breach of an implied contract arising from the relation of carrier and passenger and the duty of such carrier carefully to convey such passenger, but applied only to actions which were actions of tort; but it is to be observed that the cause of action, whether in form an action of tort or an action of contract, is a cause of action arising out of the relation of the defendant to the plaintiff. In the present case the cause of action of the plaintiff arises from the duty of the defendants as vendors of food to the plaintiff as purchaser through his wife as his agent, just as in *Baker* v. *Bolton* (1) the cause of action arose from the duty of the defendants, the coach proprietors, to the plaintiff.

But to go back to the question whether Lord Ellenborough's ruling applies to a case where the action is, as it is in this case, in form and substance an action for breach of contract: I will dispose first of any question as to the correctness of Lord Ellenborough's ruling when the action is in tort for negligence. The cases of *Osborn* v. *Gillett* (2) and *Clark* v. *London General Omnibus Co.* (3) govern us, so that it is not open to us, even if we thought the ruling wrong, to differ from it. All we can do is to examine the underlying principle and to see whether there is anything in that principle which should limit the application of the rule in *Baker* v. *Bolton* (1), that in a civil Court the death of a human being cannot be complained of as an injury, to actions of tort. And I will observe here that in the action of *Frost* v. *Aylesbury Dairy Co.* (4), which went to the Court of Appeal, and was an action for breach of warranty, the damages were limited to expenses to which the plaintiff had been put in consequence of the illness and death of the wife of the plaintiff, and no point arose as to loss of services. The principle upon which the ruling in *Baker* v. *Bolton* (1) was founded was much discussed in *Osborn* v. *Gillett*. (2) Pigott B., who delivered the first judgment, says: "The ruling was that the death of any human being could not be complained of as an injury—i.e., as

(1) 1 Camp. 493.
(2) L. R. 8 Ex. 88.
(3) [1906] 2 K. B. 648.
(4) [1905] 1 K. B. 608

an actionable injury." He cannot mean here that death was the cause of action, for it seems to me that he must mean that the death of any human being cannot be included or complained of as an element of damage; and the oft-quoted recital in Lord Campbell's Act, "Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect, or default," &c., which, as Pigott B. points out, is not confined to cases to which the maxim "Actio personalis moritur cum persona" applies, but is perfectly general, again deals with damages, and not with the negligence or wrongful act which is essential to the cause of action; but at the same time damage in these actions for tort is essential to the cause of action. There can be no judgment for nominal damages. Kelly C.B. in his judgment calls attention to *Higgins* v. *Butcher* (1), in which Tanfield J. said, "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service," but points out that this decision proceeded on the ground that the act was a felony, and that was not the ground of the decision in *Baker* v. *Bolton*. (2) Bramwell B. delivered a dissentient judgment, but admits that the recital in Lord Campbell's Act and the decision in *Baker* v. *Bolton* (2) favour the proposition that damages cannot be recovered by a plaintiff in respect of the death of a human being, and bases his judgment upon the proposition that, where the plaintiff has, in fact, sustained a damage from a wrongful act for which the defendant is responsible, he ought, according to the general principles of the English law, to be able to recover such damage; and that, to establish an anomalous exception to this rule, for which exception no reason is given, one ought to find a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in English law.

It seems to me that in *Clark* v. *London General Omnibus Co.* (3) we find the express recognition of the exception dealt with by Bramwell B. and its necessary foundation, and not the less so

(1) Yelv. 89.

(2) 1 Camp. 493.

(3) [1906] 2 K. B. 648. The citations made by the Lord Justice are from the report of the same case in 95 L. T. 435.

C. A. 1909

JACKSON v. WATSON & SONS.

Vaughan Williams L.J.

because that action, like *Baker* v. *Bolton* (1), was an action of tort. I will now deal with *Clark* v. *London General Omnibus Co.* (2), which again was an action of tort, in which Lord Alverstone C.J. says: "It is true that a controversy has been waged around this case among eminent lawyers; for instance, in Pollock on Torts, pp. 62—64, 7th edition, the matter is discussed. I can well understand persons contending that, when death has been caused by a wrongful act, and that death causes damage to a third person, that gives a cause of action for the loss. I think, however, that that contention goes too far, and I concur with the reasoning of the majority of the judges in *Osborn* v. *Gillett* (3), and not with that of Bramwell B." Farther on Lord Alverstone says: "Ought we then to hold that the reasoning of Kelly C.B. in *Osborn* v. *Gillett* (3) was wrong, and that of Bramwell B. right? I must say that to some extent I agree with Bramwell B. that the case of *Baker* v. *Bolton* (1) is not so great an authority as has been contended. I desire to base my judgment upon the ground put by Mr. Marshall in his very able and concise argument—that is, that no right of the father has been violated. What right of the father can be said to have been violated? What is the injuria and damnum? The father has no property in the child. Therefore it seems to me there has been no breach of duty towards the father, and no property of the father has been injured." But the concluding words of Lord Alverstone are these: "I am of opinion, therefore, that no duty towards the plaintiff has been broken, and that no right of his has been infringed, so as to give him a right of action either at common law or under the statute." Sir Gorell Barnes in his judgment says: "As to the common law, the plaintiff fails to make out that any right of his has been infringed by the death of his child. The action is brought for damages for loss of services. There is a difference between an action for loss of services caused by a temporary suspension of the services and for loss of services caused by death." And he concludes with these words: "Therefore the plaintiff, with regard to this claim, is within the difficulty raised by the proposition that a person who has

(1) 1 Camp. 493.
(2) [1906] 2 K. B. 648.
(3) L. R. 8 Ex. 88.

suffered damnum sine injuria cannot maintain an action." Farwell L.J. in his judgment says: "I will assume that a father is legally liable to incur the expense of burying his child, although I do not decide that question. In my opinion, however, the pecuniary damage arises from something which is not an infringement of any legal right of the father."

Some passages in these judgments seem to base the decision on the impossibility of making the death of some one rendering services an element of damage, after those services thus come to an end, on the ground that the death itself caused by negligence or wrongful act of the defendant, although it may cause loss to the plaintiff, is not a legal wrong of which he can complain. Other passages seem rather to support the view that, where there is a cause of action independently of the wrong causing the death, such as a breach of contract, damage arising from the death of a human being may be included as an element of damage.

The only other case to which I have to refer is *The Vera Cruz*. (1) Brett M.R. says in that case (2): "The death of the man caused by the negligence of the defendants is only part of the cause of action. There must be actual injury to the person on whose account the action is brought." Bowen L.J. says (3): "The only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family." Fry L.J. says (4): "Compare, by way of illustration, damage done to a barge by the bowsprit of a ship, and a person killed by the same thing. In the first instance, the cause of action is the injury actually caused by the ship. But in the second, the real ground of action is injury sustained by relatives resulting from the death of a person which resulted from the damage done to him by the ship." This case was an action under the Admiralty Court Act, 1861, s. 7, and has no direct bearing on the present point, but it serves well to illustrate the difference between the cases where the death of a human being is part of the cause of action and the cases where the death is only an element in the damages. This consideration seems to

(1) (1884) 9 P. D. 96.
(2) Ibid. at p. 100.
(3) Ibid. at p. 101.
(4) Ibid. at pp. 101, 102.

C. A. 1909

JACKSON v. WATSON & SONS.

Vaughan Williams L.J.

supply a sound reason why the rule in *Baker* v. *Bolton* (1) should only apply to cases where the death is an essential part of the cause of action.

As far as I know there is very little authority in the reports on the point in question beyond the authorities which I have cited. There is a statement by Lord Campbell, then Sir John Campbell, A.-G., in *Duncan* v. *Findlater* (2) which runs thus: "In one important point the English and Scotch law differ from each other. By the English law, if a man's wife or son should be killed on the spot, he could have no action against the person whose negligence had caused the death." But this statement leaves open the question whether the exclusion would apply to a case of damage as distinguished from solatium. Moreover, the action was an action in tort.

On the whole I have come to the conclusion that this exception from the general principles on which damages are based only applies to cases where the cause of action is the wrong which caused the death and does not apply to cases where there is a cause of action independently of such wrong. I think, therefore, that this appeal must be dismissed with costs.

FARWELL L.J. The plaintiff sues for breach of contract of warranty of fitness for human food of certain tinned salmon supplied to and eaten by himself and his wife, and there is not (and indeed since *Frost* v. *Aylesbury Dairy Co.* (3) there could not well be) any question as to the sufficiency of his cause of action: the only question is as to the damages. The jury have given him 200*l.* for the loss of the society and services of his wife, who died from the effects of eating the salmon. It is argued that no such damages can be recovered, on the authority of the direction to the jury by Lord Ellenborough in *Baker* v. *Bolton* (1) that "in a civil Court the death of a human being could not be complained of as an injury." It is true that this ruling is in general terms, but it must be read as applying to the case before the Court, which was an action of tort against a coach proprietor for negligent driving. Although the report is

(1) 1 Camp. 493.

(2) (1839) 6 Cl. & F. 894, at p. 898.

(3) [1905] 1 K. B. 608.

brief, the actual declaration in the action is set out in Chitty on Pleadings, 7th ed., vol. 2, p. 488, and it is clearly in tort, and in 1808 a plaintiff who sued in tort could not recover in contract. Now in an action in tort for negligence the damages are of the essence of the action: negligent driving per se gives no cause of action; the cause of action arises when the negligent driving has resulted in damage to the plaintiff. Lord Ellenborough's ruling was therefore that death could not be used for the purpose of giving rise to such a cause of action, and in *The Vera Cruz* (1) the proposition is thus stated by Lord Bowen: "The killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act." But the case is different where the plaintiff sues in contract; the cause of action in such a case arises on the breach, and damages ensue as a matter of course although the amount may be only 40*s*. This distinction is thus stated by the Court of Common Pleas in *Knights* v. *Quarles* (2): "If a man contracted for a safe conveyance by a coach and sustained an injury by a fall, by which his means of improving his personal property was destroyed, and that property in consequence injured—though it was clear that he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in assumpsit for the consequences of the coach proprietor's breach of contract"; and this has, in fact, been done in *Bradshaw* v. *Lancashire and Yorkshire Ry. Co.* (3), the decision in which was cited with approval by Lord Halsbury in *The Greta Holme* (4); and see, too, Lord Bowen's judgment in *Phillips* v. *Homfray*. (5) It is true that Lord Ellenborough in *Chamberlain* v. *Williamson* (6) appears to take a narrower view; but his opinion was a dictum only, and is apparently inconsistent with *Raymond* v. *Fitch* (7): see also 1 Wms. Saund., p. 216 (a), note 1. These were cases in which the contracting party was the person killed, and were therefore complicated by the application to them of the

(1) 9 P. D. 96, at p. 101.
(2) (1820) 2 Brod. & B. 102, at p. 104.
(3) (1875) L. R. 10 C. P. 189.
(4) [1897] A. C. 596, at p. 601.
(5) (1883) 24 Ch. D. 439, at p. 456.
(6) (1814) 2 M. & S. 408, at p. 415.
(7) (1835) 2 C. M. & R. 588.

C. A. 1909

JACKSON v. WATSON & SONS.

Farwell L.J.

maxim "Actio personalis moritur cum persona"—a maxim which has, of course, no application to the present case, where the plaintiff is the contractor and the person killed a third person. In such a case I see no ground for applying the ruling in cases of tort: the death is not an essential part of the cause of action, but is only an element in ascertaining the damages, and I know of no authority, and can find no ground in reason or common sense why no damages should ever be given in case and by reason of the death. It was said that the reasoning of Gwynne J. which was approved by Sir Gorell Barnes in *Clark* v. *London General Omnibus Co.* (1) is opposed to this. I cannot say that the Canadian judge's reasoning satisfies me as fully as it did Sir Gorell, but it is founded on the nature of the workman's employment and appears to me inapplicable to the case of a wife: our Courts regard the marriage tie as so sacred that they hold contracts in contemplation of future separation to be void as against public policy; it should surely follow that, in considering the husband's loss by his wife's death, the possibility of their future separation by any other means than death should be disregarded. In my opinion damages for such loss ought to be assessed on the basis of the probable duration of their joint lives and the loss of the husband during that period. What the loss may be must depend on the circumstances of each case and the rules of law applicable to the reasonable consequences of breach within the contemplation of the parties, as in *Hadley* v. *Baxendale* (2) and *MacMahon* v. *Field*. (3) Take, for instance, the case put to Bramwell B. by the Lord Chief Baron in *Osborn* v. *Gillett* (4) of the killing of a cestui que vie; the learned Baron's answer, that there could be no liability in such a case "because there was no legal relation between the two," shews that he had this distinction between tort and contract in mind, and he was probably thinking of a judgment of the Court of which he was a member in *Morgan* v. *Ravey* (5), in which it was said that, "Where a relation exists between two parties which involves the

(1) [1906] 2 K. B. 648.
(2) (1854) 9 Ex. 341.
(3) (1881) 7 Q. B. D. 591.
(4) L. R. 8 Ex. 88, at p. 90.
(5) (1861) 6 H. & N. 265, at p. 276.

performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." I see no reason why a man who has an estate pur autre vie should not contract with, say, a doctor to maintain and attend and do his best to keep alive the "vie," telling him of the value and importance thereof to him, nor why he should not recover damages founded on his actual loss if the "vie" died through the doctor's negligence. The present case is not complicated by any consideration of remoteness of damage. The jury have given a reasonable sum for the natural consequences of the husband's loss of his wife.

In my opinion this appeal should be dismissed with costs.

KENNEDY L.J. The exact point raised by the defendants in this case is apparently novel. The case of *Clark* v. *London General Omnibus Co.* (1) binds us to hold that, where a person's death has been caused by the actionable conduct of another, although, if the deceased person had been injured only and not killed, he would have been entitled to sue the wrongdoer for the damage occasioned to himself by the wrongful act, no one, whatever his connection with the deceased may be, can maintain an action of tort for damage resulting to himself from the death, in regard either to the payment of funeral expenses or to loss of service, except, in regard to loss of service, in circumstances to which the provisions of the Fatal Accidents Act, 1846, in favour of a wife, husband, parent, or child, are applicable. The loss recoverable as damages from the tortfeasor under that Act must be one arising out of a relationship, and not merely from the determination of a contract; it may be sufficiently evidenced by a reasonable expectation of pecuniary benefit, but expenses of burial and mourning are not allowed to be included in the compensation.

The rule of the common law approved by the Court of Appeal in *Clark* v. *London General Omnibus Co.* (1) was stated by Lord Ellenborough in 1808 in *Baker* v. *Bolton* (2) to be that "in a civil Court the death of a human being could not be complained

(1) [1906] 2 K. B. 648. (2) 1 Camp. 493.

C. A. 1909

JACKSON v. WATSON & SONS.

Kennedy L.J.

of as an injury," and by Bowen L.J. in *The Vera Cruz* (1), "The killing of the deceased per se gives no right of action at all either at law or under Lord Campbell's Act." Lord Blackburn in *Seward* v. *Owner of the Vera Cruz* (2) appears to justify the rule as an application of the legal maxim "Actio personalis moritur cum persona." One may, I hope, whilst acknowledging the existence of the rule, be permitted to share in the dissatisfaction with this theory which was so lucidly expressed by Bramwell B. in his (the dissenting) judgment in *Osborn* v. *Gillett*. (3) The learned reporter, in his note to the case before Lord Ellenborough, and Sir Frederick Pollock, in his work on Torts, 8th ed. pp. 64, 65, have questioned the correctness of the rule itself. A learned and careful writer on "Negligence in Law" has suggested that a reason for the rule may be found in the conditions of domestic labour prior to the visitation of the "Black Death" in 1348 (Beven on Negligence, 3rd ed., vol. 1, p. 182).

The present case, however, is not one of an action of tort. It is an action brought by the plaintiff against the defendants for the breach of a contract for the sale of an article which was by the implied terms of the contract warranted by the defendants to be fit for human food, whereas in fact it was unfit and caused the illness of the plaintiff and the death of the plaintiff's wife. The jury by their verdict have awarded the plaintiff, in addition to a small sum for medical expenses, compensation for the expenses of the burial of the wife and also compensation for the loss of the wife's services. There was a family of seven young children, and the death of the wife has cast upon the husband the necessity of employing paid assistance. The defendants make no point as to the award for funeral expenses, but, arguing from the judicial reasoning and dicta to be found in the cases to which I have referred, they have challenged by this appeal the legality of the last-named item of compensation.

It appears to me that the doctrine affirmed by the Court of Appeal in *Clark* v. *London General Omnibus Co.* (4) does not apply, and that this contention of the defendants ought

(1) 9 P. D. 96, at p. 101.
(2) (1884) 10 App. Cas. 59, at p. 70.
(3) L. R. 8 Ex. 88, at p. 94.
(4) [1906] 2 K. B. 648.

not to prevail. The plaintiff here has a cause of action in contract; and, if the breach of a contract occasions pecuniary damage, necessarily or naturally flowing from the breach, it appears to me that, as a matter of principle, such damage ought to be recoverable equally where it is connected with the death or with the bodily injury of the person the loss of whose services, through the breach of contract, constitutes the plaintiff's claim. The plaintiff in such a case does not found his action on the death of his wife or servant, as the case may be; he has, in the defendants' breach of contract with himself, a right of action wholly independent of the "killing of the deceased per se," to quote the language of Bowen L.J. in *The Vera Cruz*. (1) Nor do I think that a distinction in principle can soundly be drawn between the case where the breach of contract complained of has resulted in the loss of the services of a wife and the case where it has resulted in the termination of the services of a servant. The service in each case, to justify compensation in damages, must, of course, be proved to be of pecuniary value, and all such circumstances as might in any case have terminated or abbreviated the enjoyment of the services or diminished their value must be taken into consideration by the jury. A contract for valuable services extending over a long fixed term obviously differs, in regard to the proper quantum of compensation, from an engagement for the like services which extends only to a short term, or which is terminable at short notice. Having regard to the way in which the law regards the matrimonial tie, the relation of husband and wife must be treated as the most permanent of all domestic relations.

It has not been argued before us that, assuming a husband to be a person who may recover compensation for a pecuniary loss consequent upon his wife's death, the damage in this particular case is too remotely connected with the defendant's breach of the warranty contained in his contract with the plaintiff; and indeed in the recent case of *Frost* v. *Aylesbury Dairy Co.* (2), where the question of the applicability of s. 14, sub-s. 1, of the Sale of Goods Act, 1893, to a sale of milk was contested, no question appears to have been raised by the appellant either in

(1) 9 P. D. 96, at p. 101. (2) [1905] 1 K. B. 608.

C. A. 1909

JACKSON v. WATSON & SONS.

Kennedy L.J.

the Court of first instance or in the Court of Appeal that, if the section did apply, the plaintiff was not entitled to the damages which the jury had awarded him in respect of the loss and expense to which the plaintiff had been put by the illness and death of his wife. I cannot see, as I have already said, in regard to its character as damage naturally flowing from the breach of contract, any sufficient distinction between expense incurred by the husband in respect of loss on account of his wife's illness and pecuniary loss incurred by him on account of her death. In my opinion this appeal fails.

Appeal dismissed.

Solicitors for plaintiff: *Milner & Bickford, for Wain & Harris, Burslem.*

Solicitor for defendants: *M. A. Orgill, for Llewellyn & Son, Tunstall.*

E. L.

K. B. D. 1908

July 21, 22, 27.

C. A. 1909

March 23, 24, 25.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

SAXBY *v.* FULTON.

Gaming—Cause of Action—Gaming in Foreign Country — Money lent for Purpose of Gaming.

Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts.

Quarrier v. *Colston*, (1842) 1 Ph. 147, followed.

Moulis v. *Owen*, [1907] 1 K. B. 746, discussed.

ACTION tried before Bray J. without a jury, and appeal of the defendant from the judgment therein. The facts are stated in detail in the judgment of Bray J.; the following short summary is sufficient in the present place.

The action was brought against the defendant, as the executrix of one Brook, to recover a sum of about 4150*l.* as money lent to Brook by the plaintiff; there was also a claim upon an account stated. The plaintiff and Brook, who was an intimate friend,

had for years been in the habit of paying a visit together in the spring to Monte Carlo. The plaintiff found in the first instance the whole of the money for the expenses of both, while Brook made all the arrangements and paid all the bills out of the money supplied to him for that purpose. Accounts were settled after their return to England, when the expenses of the trip were shared equally between them, and the balance remaining due from the one to the other was discharged. The money which it was sought to recover in the present action had been advanced by the plaintiff to Brook during their trips in 1905 and 1906, and the greater part of it had been used by Brook for the purpose of gambling at the roulette tables at Monte Carlo. At the trial of the action a question arose as to whether at the time of the various loans the plaintiff knew that Brook intended to use the money for gambling; but both Bray J. and the Court of Appeal assumed for the purposes of their respective judgments that the plaintiff did know it, and that he advanced large portions of the money for the purpose of their being so used by Brook. Accounts were settled between the plaintiff and Brook after their return to England in 1905 and 1906, shewing a large balance due to the plaintiff, and upon this balance Brook paid interest to the plaintiff down to October, 1907. Brook died in March, 1908, and this action was brought against his executrix to recover the balance due. The defence was, in substance, that the money, having been lent for the purpose of gaming, was not recoverable in this country, although the loans were made in a foreign country for the purpose of playing at a game which was not illegal by the law of that country.

Bankes, *K.C.*, and *Boydell Houghton*, for the plaintiff.
Rufus Isaacs, *K.C.*, and *J. R. Randolph*, for the defendant. (1)

1908. July 27. BRAY J. In this case the plaintiff sought to recover from the executrix of a solicitor named Brook moneys which he alleged he had lent to the testator, with interest at

(1) It is not considered necessary to give the arguments at nisi prius as well as those in the Court of Appeal, which were to the same effect.

1908

SAXBY v. FULTON.

Bray J.

5 per cent. There was a small question as to the amounts lent, but the main defence was that the money was lent for the purpose of gaming, and that, in consequence, the consideration was illegal. The only witness called was the plaintiff, and the facts proved, or admitted, were as follows.

The plaintiff and the testator had been intimate friends for many years, and they had had many business transactions in the course of which the plaintiff had often lent the testator money, and on all these loans the testator had paid interest at the rate of 5 per cent. For many years before his death the testator had gone abroad in the spring with the plaintiff, and on several of these occasions they had gone together to Monte Carlo. They had so gone in the spring of the years 1905 and 1906. On these visits it was the practice of the testator to pay all expenses, including railway journeys, and for the plaintiff to advance to the testator any moneys he required. On their return to England the testator rendered an account to the plaintiff, and a balance was struck shewing what money was due to the plaintiff after deduction was made from the advances of the plaintiff's share of the expenses. In the year 1905 the total advances made by the plaintiff were 3200*l.*, and, deducting a share of expenses, there was a balance arrived at of 3080*l.*, and this was shewn by an account in the testator's handwriting which was produced by the plaintiff. Every three months the testator paid the plaintiff 5 per cent. interest on this balance. In the year 1906, the plaintiff said, no statement was rendered by the testator to him, but they agreed the balance. The plaintiff was unable to recollect the amount, but he received payment of three months' interest on several occasions, each quarterly payment amounting to 13*l.* 7*s.* 3*d.* This would represent 5 per cent. interest on a sum of about 1070*l.*; it may be a few shillings less, but nothing to speak of. The actual advances were 1224*l.*, which would go to shew that a deduction of 154*l.* was made for the plaintiff's share of the expenses. I therefore take 1070*l.* as the balance struck for the year 1906. This will make a total amount due of 4150*l.* roughly, on which interest at 5 per cent. is to be paid.

Now as to the circumstances under which these advances were made. According to the plaintiff, whose evidence I accept as

substantially true, very little took place when they were made. The testator used to come to the plaintiff at the hotel where they were staying, which was not where the gaming took place, and ask him for a cheque, saying that he wanted money, and sometimes using the expression that he was cleaned out. The plaintiff then gave the testator his cheque-book, and the testator wrote out a cheque for the money he required and the plaintiff signed it. The cheques were usually drawn in favour of the proprietor of the hotel. The testator took the cheques away and presumably cashed them. The plaintiff knew that the testator was in the habit of playing roulette at the public gaming tables, and from the large amounts of the advances the plaintiff knew that the testator might be going to use the money for staking at the tables, and he expected that the greater part of the money would probably be so used; not the whole, however, because he knew that some would have to be used to pay the hotel and other expenses. This was especially the case with respect to the advance of 5000 francs on March 9, 1905, and the advance of 224*l.* on March 26, 1906. There was, however, no arrangement, no understanding at all, as to how the moneys were to be used. The testator was at liberty to use them for any purpose he liked. No doubt a large part of the money was used by the testator for gaming, but there was no evidence as to how much. The testator spent money on his own account in addition to the moneys for the joint expenses. I do not think I should be prepared, on this evidence, to hold that the defendant had proved that these advances were made for the purpose of gaming; and certainly the plaintiff never contemplated that he was doing anything illegal. However, for the purposes of my judgment, I assume that the advances were made for the purpose of being used by the testator for gaming. I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game.

These being the facts, it was contended on behalf of the plaintiff that they were the same as in *Quarrier* v. *Colston* (1),

(1) 1 Ph 147.

1908

SAXBY v. FULTON.

Bray J.

and that I was bound by that decision. I think the facts, as I have found or assumed them to be, are substantially the same as in that case; and I think I am bound by that decision to find that these moneys are recoverable, unless it can be shewn that the case has been overruled, or that there are other decisions in conflict with it. It is to be remembered, moreover, that it was the decision of Lord Lyndhurst, then Lord Chancellor, sitting as a Court of Appeal. It is said on behalf of the defendant that doubts have been thrown on it in this Court in *Moulis* v. *Owen* (1), and reference was made to the observations of Collins M.R. in that case. (2) I need not read the whole, which ends thus: "The decision, therefore, in *Quarrier* v. *Colston* (3) in no way assists the respondent in this case, which turns on the validity of the cheque only"; but he did say this: "This case relates to the consideration only, and from what appears in the statement of facts there was nothing to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson* v. *Bland* (4), from the fact that an English bill was given." I do not think that Collins M.R. meant to do more than distinguish that case from the case he was deciding. I do not think he intended to intimate that he thought the decision wrong, and certainly I cannot treat the case of *Quarrier* v. *Colston* (3) as overruled.

The next case was *McKinnell* v. *Robinson* (5), which I think is clearly distinguishable. There was a demurrer to a plea, and this plea was held to be good: "The said sum of 30*l.* in the second count mentioned was borrowed by the defendant, as the plaintiff then well knew, and was knowingly lent by the plaintiff to the defendant in a certain common gambling room, in a parcel of a certain messuage and premises, for the purpose of the defendant's illegally playing and gaming therewith at and in the said gambling room, at a certain illegal game, to wit, the game of hazard, contrary to the statute in such case made and provided." Now that case, as I have said, seems to me clearly distinguishable, because the plea stated in terms that it was lent

(1) [1907] 1 K. B. 746.
(2) Ibid. at p. 751.
(3) 1 Ph. 147.
(4) (1760) 1 W. Bl. 234, 256; 2 Burr. 1077.
(5) (1838) 3 M. & W. 434.

for the purpose of the defendant illegally gambling in a common gambling house.

The next case was *Applegarth* v. *Colley* (1), and reliance was placed on a passage in the judgment (2) which runs thus: "That Act," referring to the Act of William IV., "while it repeals so much of the statute of Anne as makes the securities void, expressly enacts that they shall be deemed to have been given on an illegal consideration; and it is impossible to impute to the Legislature an intention so absurd, as that the consideration should be good and capable of being enforced until some security is given for the amount, and then that by the giving of the security the consideration should become bad." That ends that paragraph, but there immediately follows this: "We assume, therefore, with the defendant, that the statute of Anne, in connection with the 5 & 6 Will. 4, c. 41, must be taken to avoid all contracts for the payment of money won at play. But then the question arises, is the contract which the plaintiff here is seeking to enforce a contract for the payment of money lost at play, within the true intent and meaning of the statute of Anne?" and then the decision is that it was not for money lost at play within the statute, and therefore the sums were recoverable. It is to be observed that that passage really only deals with money lost at play. It may be said, no doubt, that it applies to everything in the statute of Anne, and that may be so; but it is plainly only a dictum, and it seems to me that it is impossible to say that a decision of the Court of Appeal can be said to be overruled by a dictum. As a matter of fact, the decisions were given almost at the same time, and I do not see that either case is quoted in the other.

In the case of *Robinson* v. *Bland* (3) Lord Mansfield says: "Next as to the money lent. It has been twice judicially determined . . . . that the Legislature meant only to void the security, not the contract; in order to give Courts an opportunity to examine into the merits of the consideration; which in this case is stated to be extremely fair. Possibly it might be lent to pay foreigners' money won, and thereby to extricate the deceased

(1) (1842) 10 M. & W. 723.
(2) Ibid. at p. 732.
(3) 1 W. Bl. 234, at p. 259; 2 Burr. 1077.

1908

SAXBY v. FULTON.

Bray J.

from the clutches of the court of honour. Here also then the law of France is the same as in England; the contract, when fair, is good in both countries, and the plaintiff must, therefore, recover under his counts for the general assumpsits." That case is one which at first sight is in favour of the plaintiff's view; but it was decided before the Act of William IV. When that Act is considered, it has to be borne in mind that the words are "shall be deemed and taken to have been given for an illegal consideration." The object does not seem to have been to make the law more stringent, but to protect bona fide holders for value of negotiable securities, and this was done by providing that they should be deemed and taken to be given for an illegal consideration instead of being declared utterly void.

In construing all these Gaming Acts it is as well to remember further what was said by Jessel M.R. in *Ex parte Pyke* (1), that they are Acts imposing penalties and must be strictly construed. However, I cannot see anything in any of these cases to shew that *Quarrier* v. *Colston* (2) was wrongly decided. It is sufficient for me to say that I cannot find that that case has been overruled, nor that it is in conflict with any other decision, and therefore I am bound to follow it. My judgment must therefore be for the plaintiff for the sum of 4150*l.* with interest at the rate of 5 per cent.

Judgment for the plaintiff.

The defendant appealed.

1909. March 23. *Atkin, K.C.*, and *Randolph*, for the defendant. The question raised in this case is whether an action brought to recover money knowingly lent by the plaintiff to a person for the purpose of gaming can be maintained. In principle the case is concluded by the decision in *Moulis* v. *Owen* (3), where it was held that an action upon a cheque given in respect of money lent for the purpose of gaming abroad was not maintainable by reason of the provisions of the Gaming Acts, 1710 and 1835. It is true that in that case the action was only upon the cheque, the security for the money lent,

(1) (1878) 8 Ch. D. 754. (2) 1 Ph. 147.
(3) [1907] 1 K. B. 746.

and not upon the consideration for the cheque, but it follows by necessary implication from the provisions of s. 1 of the Gaming Act, 1710, which avoided any security given for money knowingly lent for the purpose of gaming, that the consideration for such a security, that is, the contract of loan itself, was also avoided. If that were not so, the only effect of the statute practically would be to take away the right of a bona fide holder for value of a security given in respect of such a loan, while leaving it open to the lender himself to recover the money lent by an action on the consideration for which the security was given. This cannot have been the intention of the Legislature. The Gaming Act, 1835, which was passed for the relief of innocent holders for value of securities given for gaming debts, repealed so much of the Gaming Act, 1710, as enacted that any note, bill, or mortgage should be absolutely void, and enacted that "every note, bill, or mortgage which, if this Act had not been passed, would by virtue of" among other Acts the Gaming Act, 1710, "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." That Act must also be construed as by necessary implication avoiding the contract for repayment of money knowingly lent for gaming purposes. Sect. 2 of the Gaming Act, 1835, clearly shews that no action would lie for money lent in such a case, for it provides that if a person, who has given such a security as comes within the Gaming Act, 1710, shall actually pay the money secured thereby to an indorsee, holder, or assignee of the security, the money so paid shall be deemed to have been paid on account of the person to whom the security was originally given, and to be a debt due from him to the person who shall have paid the same. This provision is incompatible with the existence of a valid debt for money lent from the giver of the security to the person to whom it was given. The necessary implication from the two Acts taken together is that any contract for the repayment of money knowingly lent for the purpose of gaming is thereby rendered void.

In *Moulis* v. *Owen* (1) it was held that the transaction there

(1) [1907] 1 K. B. 746.

C. A. 1909

SAXBY v. FULTON.

in question must be governed by English law, the cheque having been drawn in English on an English bank and payable in England and stamped with an English stamp, though it was drawn in Algiers, where the gaming took place. By French law the consideration for the cheque was legal, but the majority of the Court of Appeal nevertheless held that, the transaction being governed by English law, the cheque would be deemed to have been given for an illegal consideration within the meaning of s. 1 of the Gaming Act, 1835, and that the action was therefore not maintainable. Assuming that, as the defendant contends, the effect of the Gaming Acts, 1710 and 1835, taken together is not only to avoid any security given in respect of such a loan as between the immediate parties, but also by necessary implication to avoid the consideration for it, that is, the contract of loan itself, then *Moulis* v. *Owen* (1) is a direct authority in the defendant's favour; for it shews that, under such circumstances as existed in the present case, the transaction must be governed by English law, and the Gaming Act, 1835, must therefore apply and prevent the recovery in an English Court of the money lent, although the gaming took place abroad.

The earlier authorities on the subject are doubtless conflicting. In *Barjeau* v. *Walmsley* (2) it seems to have been thought that an action would lie to recover money lent for the purpose of gaming. But in *Young* v. *Moore* (3) the Court of Common Pleas appear to have refused to follow that decision and to have held that the action for money lent would not lie. In *Robinson* v. *Bland* (4) the Court of King's Bench held that, though the claim on a bill of exchange given for money lent for gaming and for money lost at play must fail, the plaintiff could succeed on the count for money lent, as the Gaming Act, 1710, only avoided the security and not the contract of loan. On the other hand, *McKinnell* v. *Robinson* (5) and *Applegarth* v. *Colley* (6) are authorities to shew that in such a case the action for money lent would not lie. *Quarrier* v. *Colston* (7) is no doubt an authority

(1) [1907] 1 K. B. 746.
(2) (1746) 2 Str. 1249.
(3) (1757) 2 Wils. 67.
(4) 1 W. Bl. 234, 256; 2 Burr. 1077.
(5) 3 M. & W. 434.
(6) 10 M. & W. 723.
(7) 1 Ph. 147.

that an action can be successfully brought in England in respect of money lent for gaming purposes in a foreign country where the gaming was legal, but in that case the circumstances did not indicate, as they clearly do here, that the parties intended the contract to be governed by the law of England; it is, moreover, inconsistent with *Moulis* v. *Owen*. (1) In the present case the parties were both English, they only visited Monte Carlo for short periods, the money was advanced by means of English cheques, and the accounts between the parties were always settled up after their return to England. The true inference from all the facts is that they contracted on the understanding that their rights under the contract would be governed by English law.

Assuming that the defendant cannot support the contention that the Gaming Acts, 1710 and 1835, apply so as to avoid a contract in respect of the loan of money for the purpose of gaming in a foreign country where gaming is lawful, it is submitted that even on that assumption the Court will not enforce such a contract, on the ground that it is contrary to public policy and the interests of the realm that English subjects should be encouraged and assisted in squandering their money by gambling abroad. [They cited on this point *Rousillon* v. *Rousillon* (2); *Kaufman* v. *Gerson* (3); *In re Missouri Steamship Co.* (4); *Hope* v. *Hope*. (5)]

Bankes, K.C., and *Boydell Houghton*, for the plaintiff. The weight of authority clearly supports the view that the Gaming Act, 1710, only avoids the security given for a gambling debt, but does not avoid the consideration for which the security was given: *Alcinbrook* v. *Hall* (6); *Barjeau* v. *Walmsley* (7); *Wettenhall* v. *Wood* (8); *Robinson* v. *Bland* (9); *Ex parte Pyke*. (10) In *Moulis* v. *Owen* (1) the only question to be considered was whether an action could be maintained on the security given, which was an English cheque payable in England—that is,

(1) [1907] 1 K. B. 746.
(2) (1880) 14 Ch. D. 351.
(3) [1904] 1 K. B. 591.
(4) (1889) 42 Ch. D. 321.
(5) (1857) 8 D. M. & G. 731.
(6) (1766) 2 Wils. 309.
(7) 2 Str. 1249.
(8) (1793) 1 Esp. 18.
(9) 1 W. Bl. 234, 256; 2 Burr. 1077.
(10) 18 Ch. D. 754.

C. A. 1909

SAXBY v. FULTON.

whether the security was avoided as having been given for an illegal consideration within the meaning of the Gaming Act, 1835. That case is not an authority for the proposition that an action for money lent will not lie in such a case as the present, where there is no question of any security given for the loan.

Secondly, assuming that the Gaming Acts, 1710 and 1835, applied, in order to support the defence set up it was necessary to prove that the money was knowingly lent for the express purpose of gaming, or at least with a distinct understanding that it would be applied for that purpose: see *Cannan* v. *Bryce* (1); *Pearce* v. *Brooks* (2); *Hodgson* v. *Temple* (3); *Pellecat* v. *Angell.* (4) The evidence in the present case does not prove that the money was advanced by the plaintiff for the purpose of being used for gaming; it is not sufficient that the lender had reason to suspect that the money might be so used.

Thirdly, assuming that the Gaming Acts, 1710 and 1835, avoid not only the security itself, when given in respect of money knowingly lent for the purpose of gambling, but also the consideration for such a security, the question remains whether they apply to a case where money is lent for the purpose of gaming in a foreign country where gaming is not unlawful or prohibited by law. In *Moulis* v. *Owen* (5) the only question was whether the security was governed by the law of England, it being an English cheque, payable in England; no further question arose as to the contract of loan. That case is not an authority on the question whether a loan of money for the purpose of gaming made in a foreign country where gaming is not illegal is a void transaction by reason of the provisions of the Gaming Acts, 1710 and 1835. Prima facie a contract is governed by the lex loci contractus, and it would not be a reasonable inference that the parties in the present case intended the contract of loan to be governed by the law of

(1) (1819) 3 B. & Al. 179, at p. 185.
(2) (1866) L. R. 1 Ex. 213, at pp. 218, 219, 220.
(3) (1813) 5 Taunt. 181.
(4) (1835) 2 C. M. & R. 311.
(5) [1907] 1 K. B. 746.

England, if that law would make it void, rather than by the law of the country where it was made, by which law it was valid. There is no sufficient reason in the present case for inferring that the parties intended that the loan transaction which took place abroad should be governed by the English statutes or by the law of England on the subject. *Quarrier* v. *Colston* (1) and *King* v. *Kemp* (2) are distinct authorities to the effect that money lent under such circumstances as existed in the present case can be recovered in the English Courts. The contract being legal in the country where it was made, it is enforceable in the English Courts, unless its enforcement would be contrary to public policy, public morality, or natural justice, which cannot be successfully contended to be the case. [They also cited *South African Breweries Co.* v. *King* (3); *Saffery* v. *Mayer* (4); *Hyams* v. *Stuart King.* (5)]

VAUGHAN WILLIAMS L.J. I have read the judgment of Bray J. in the Court below and I am of opinion that it was right and should be affirmed. I do not propose to read it page by page and to deal seriatim with the various propositions contained in it, for the conclusion at which I have arrived, although coinciding with that arrived at by Bray J., depends upon one and not upon all of the points disposed of by him. That one point, which was treated by the learned judge as the main point of the case, and which in my judgment is sufficient to dispose of this appeal, is the judgment of Lord Lyndhurst in *Quarrier* v. *Colston.* (6) The marginal note to that case runs thus: "Gambling debts contracted in this country, as well as the securities given for them, are void and cannot be recovered. But money won at play, or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the Courts of this country." In that case money had been lent for the purpose of gambling at the tables at Baden Baden, and an I. O. U. had been given for the loan. Lord Lyndhurst says (7): "The defendant and the testator travelled together

(1) 1 Ph. 147.
(2) (1863) 8 L. T. (N.S.) 255.
(3) [1899] 2 Ch. 173, at p. 181.
(4) [1901] 1 K. B. 11.
(5) [1908] 2 K. B. 696.
(6) 1 Ph. 147.
(7) 1 Ph. at p. 150.

C. A. 1909

SAXBY v. FULTON.

Vaughan Williams L.J.

on the Continent. They agreed to divide their expenses; the defendant paid more than his proportion, and the difference constitutes a part of the debt. With respect to this, no objection has been made." That is true as to part of the debt in the present case, as I understand that no objection is taken to the repayment to the plaintiff of the testator's proportion of the travelling and hotel expenses. The judgment of Lord Lyndhurst proceeds: "Another part of the debt consisted, as stated in the answer, 'of money lent to the testator when he was playing at the public tables at Baden Baden and other places in Germany, which money was employed by him in gaming at such public tables.' What ground is there for saying that this cannot be recovered? First, it does not appear what the games were, or that they would have been illegal even in England;"—the last words do not apply here, as roulette is forbidden in this country—"and until the late case of *McKinnell* v. *Robinson* (1), in the Court of Exchequer, it had always been supposed, and there are several decisions to that effect, that though securities given for money lent to play at certain games were void by the statute of Anne, yet that the money itself might be recovered: *Barjeau* v. *Walmsley* (2); *Robinson* v. *Bland* (3); *Wettenhall* v. *Wood*. (4) But in the case to which I have referred of *McKinnell* v. *Robinson* (1) it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action." The proposition relied on by Mr. Atkin is accepted by Lord Lyndhurst, who goes on: "But this rule does not apply to the present case. For there is nothing to shew that the public gaming tables where the money was lent were not lawful in the countries where they were held: on the contrary, the presumption is that, as they were public, they were lawful; and if we might import our private knowledge into a case of this nature, (upon which, however, I do not mean to rely,) it is notorious that they are, in several places in Germany, sanctioned by the Government, which receives a

(1) 3 M. & W. 434.
(2) 2 Str. 1249.
(3) 2 Burr. 1077.
(4) 1 Esp. 18.

rent from the persons by whom they are kept." This is no longer true of Germany, where public gaming tables have long since been abolished. In this particular case, however, it is agreed that we are to presume that playing on the tables in Monte Carlo, where the money was advanced by the plaintiff to Brook, was lawful there. The judgment of Lord Lyndhurst proceeds: "The Lord Chief Baron of the Exchequer, in giving judgment in the case of *McKinnell* v. *Robinson* (1), observes as to *Robinson* v. *Bland* (2), (in which it was held that money lent to play with might be recovered), that the money was not lent to play at an illegal game, gaming not being unlawful in France, where the loan was made. It does not appear therefore to me, that there is anything to prevent the defendant from recovering in respect of this part of the debt in his action at law." I need not read the remainder of the judgment, which relates to a small sum won at cards.

I am unable to understand how it is sought to differentiate the present case from *Quarrier* v. *Colston* (3), which was a decision of Lord Lyndhurst sitting upon appeal as Lord Chancellor; and I think it is clear that this Court ought not to overrule the decision of a Court which at that time occupied precisely the same position in the gradation of appeals which this Court now occupies. That decision exactly covers this case, and it is not strictly necessary that I should say more in order to decide the present appeal. But it is right that I should call attention to the observations on that decision made by the Court of Appeal in *Moulis* v. *Owen*. (4) The then Master of the Rolls (now Lord Collins) said (5): "In *Quarrier* v. *Colston* (3), decided by Lord Lyndhurst in 1842, it was held that money lent abroad and applied by the borrower in gambling, and also money won not exceeding 10*l*. at any single sitting, could be recovered in England." The last words refer to the limitation contained in the repealed statute 16 Car. 2, c. 7, with which we are not concerned. The learned judge then continues: "This case relates to the consideration only, and from what appears in the statement of facts there was nothing to

(1) 3 M. & W. 434.
(2) 2 Burr. 1077.
(3) 1 Ph. 147.
(4) [1907] 1 K. B. 746.
(5) [1907] 1 K. B. at p. 751.

C. A. 1909

SAXBY v. FULTON.

Vaughan Williams L.J.

found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson* v. *Bland* (1), from the fact that an English bill was given." That is perfectly true in the present case, for no bill or cheque was given upon which any one was to sue; it is not a case where a bill or cheque in respect of money lost at cards is given by the loser to the winner, or a case where money is lent by one man to another for the purpose of being used in gambling, and a bill or cheque for the amount of the loan is given by the borrower to the lender. The present case does not in the least differ in principle from *Quarrier* v. *Colston*. (2) The facts shew that Brook and the plaintiff had gone abroad together, and, in accordance with their practice for fifteen years, when the former wanted money he treated the plaintiff as his banker and got him to draw a cheque for the amount required. It does not appear whether the plaintiff himself cashed the cheques which he drew, but they were taken by one of the two to the hotel manager or to the local bank at Monte Carlo, and the cash so obtained was retained by or handed over to Brook, who acted as steward in administering it and paid out of it the sums required for the expenses of both. For the purpose of my judgment I take it that, at any rate after a time, it was known by the plaintiff that a great deal of the money received by Brook was being applied by him to purposes of gambling. The arrangement between the two men was that accounts between them were taken when they got back to England at the conclusion of the trip, and after debiting half the hotel expenses to the plaintiff, who gave a cheque for the amount, the balance was discharged by Brook paying it over to the plaintiff. I can see nothing to differentiate this case from *Quarrier* v. *Colston*. (2) Collins M.R. in his examination of that case proceeds thus: "It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England. It was only by dissevering the rights on the security itself from those in respect of the consideration that Lord Mansfield drew the inference that the rights on the security were to be ascertained

(1) 1 W. Bl. 234, 256; 2 Burr. 1077. (2) 1 Ph. 147.

by English law, whereas no such inference arose as to the consideration. It seems quite clear that the claim on the security was decided without any reference to French law, which in that part of the case he deals with only parenthetically. After the passage above cited as to the invalidity under the statute of Anne of all bills given on a gaming consideration he adds (1), 'And (by the way) the fact is not found whether, even in France, you may not enter into and contemplate the consideration of a gaming note. I rather think you may. However, it is clear that in England the writing, as a writing, is void.' It is only later on when he deals with the claim on the consideration for money won that he relies on the identity of the law of England with that of France in this respect. The decision, therefore, in *Quarrier* v. *Colston* (2) in no way assists the respondent in this case, which turns on the validity of the cheque only."

I have read the whole of that part of the judgment of Collins M.R. which deals with *Quarrier* v. *Colston* (2), which, as the learned judge points out, differed entirely in its facts from *Moulis* v. *Owen* (3), where the only question was as to the right of the plaintiff to recover on a cheque.

The decision in *Quarrier* v. *Colston* (2) is also examined in *Moulis* v. *Owen* (4) by Cozens-Hardy L.J., who says: "In *Quarrier* v. *Colston* (2) Lord Lyndhurst, while adhering to the view that money lent to play an illegal game could not be recovered, held that money lent at Baden Baden for the purpose of play could be recovered in England, the public gaming tables being lawful in Germany. It is argued that the debt and the security must stand or fall together, and that *Quarrier* v. *Colston* (2), which is the final decision on the point, is binding upon this Court, and that we ought to hold that the security is not hit by the Act of 1835. After considerable hesitation I have arrived at the conclusion that this argument ought not to prevail. In *Quarrier* v. *Colston* (2) there was no security, there was nothing upon which the Act of Anne or the Gaming Act, 1835, could operate. There was nothing but a parol contract, which was evidenced by an I. O. U. Lord Lyndhurst's judgment does not

(1) 1 W. Bl. at p. 259.
(2) 1 Ph. 147.
(3) [1907] 1 K. B. 746.
(4) Ibid. at p. 755.

C. A. 1909

SAXBY v. FULTON.

Vaughan Williams L.J.

govern the present case, although it leads to the strange result that a parol contract made in France may be valid if there is no security given for the loan, although, if there is a security by way of negotiable instrument payable in England, both the security and the debt are bad. If the point decided in *Quarrier* v. *Colston* (1) should come for review, as it might have done if the plaintiff had sued, not upon the cheque, but upon the original consideration, it might be necessary to consider how far Lord Lyndhurst's judgment is consistent with subsequent decisions, such as *Rousillon* v. *Rousillon* (2) and *Kaufman* v. *Gerson*. (3) It may be that on grounds of public policy the Courts of this country ought to refuse to enforce a gaming contract, even though valid according to the law of the country where it was made. But it is not necessary for us to express any opinion upon this difficult question. I am not aware that the passage from Lord Mansfield's judgment, to which I have referred, has ever been dissented from. It is quoted with approval by Fry L.J. in *In re Missouri Steamship Co.* (4), and, so far as my searches have gone, it is adopted by the leading text-writers. This being so, I think we ought to follow it in the present case." I wish to observe that there is nothing in the observations of Cozens-Hardy L.J. to indicate that he thought the Court of Appeal was at liberty to disregard the decision of Lord Lyndhurst in *Quarrier* v. *Colston*. (1) On the other hand, he seems to have treated it as a decision which was binding upon him. It may be that at some future time that decision will be reviewed in the House of Lords, but in this Court we ought to follow it, as Bray J. did in the Court below. I may once again call attention to the fact that in that case there was no security upon which the statute of Anne or the Gaming Act, 1835, could operate, and that the same is the case here.

That being the authority upon which alone this case may be decided, I think I ought nevertheless to say a few words upon some other points which have been urged before us. I start with the proposition that at common law there is nothing to prevent a person who has won money at gaming from bringing an action to recover, and recovering, the amount so won. The prohibitions

(1) 1 Ph. 147.
(2) 14 Ch. D. 351.
(3) [1904] 1 K. B. 591.
(4) 42 Ch. D. 321, at p. 340.

enacted by statute are exceptions to the common law rule. The morality of the country progressed somewhat gradually. People found that there was a great deal of gambling at houses kept for the express purpose, and that it was often carried on under circumstances which enabled the unscrupulous to prey upon the young and inexperienced, especially in cases where the latter were in the position of being owners of or heirs to large properties. The earlier legislation, therefore, did not proceed on the basis that in this country the recovery of winnings, or the enforcement of securities for the payment of losses, was in any way illegal; the consequence was that down to the passing of 8 & 9 Vict. c. 109 the earlier legislation was all of a nature to prevent what I may call illegitimate gaming. It was thought that one great step forward had been made by the attempt to convert all gaming into ready-money transactions, and another by preventing people from charging their estates by way of mortgage or by giving other forms of security which enabled pressure to be put upon them to discharge their gaming losses. I mention this because I feel that Mr. Atkin has not succeeded in persuading me that, according to the law of England as administered in the English Courts, it is impossible for those who have lent money for gaming purposes in countries where gaming is lawful to recover the amount of their loan. It is sufficient for me to say that I am bound by *Quarrier* v. *Colston* (1) to hold that that point has not been made out.

Then it was said that, even if you put on the various statutes in force as to gaming what Lord Loughborough called a "local and political character," you might still say that the Courts ought not to allow a plaintiff who has lent money for a purpose legal abroad, but illegal in this country, to recover his loan. It was contended that, if you once accepted the fact that the loan was made on purpose to enable the borrower to gamble at Monte Carlo (where gambling is lawful according to the local law), it would be contrary to English morality to allow the loan to be recovered in this country. That contention accepts the position that our statutes do not affect the right to recover abroad the amount of such a loan, but it is said that what is being done is

(1) 1 Ph. 147.

C. A. 1909

SAXBY v. FULTON.

Vaughan Williams L.J.

to make a loan in order to carry out purposes which are unlawful in England, and that therefore the plaintiff is really asking the English Courts to assist him in doing that which is contrary to the policy of the law of this country. I need not discuss this point at any length. The case of *Hope* v. *Hope* (1) was cited, in which Turner L.J., discussing the law as to the enforcement of contracts made abroad, said (2): "The question is, whether, upon the assumption which I have stated as to the French law being taken into account, the bill can in other respects be maintained. I am of opinion that it cannot, and upon these grounds—I think that when the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it." Attention must be paid to the language of Turner L.J. in the last sentence that I have quoted. He has been pointing out that there were two clauses in the agreement there in question which seemed contrary to the policy of the English law, the policy referred to being, first, that which made the father so responsible for the care of his children that he could not divest himself of that responsibility by any agreement, and, secondly, that by English law a divorce cannot be obtained by agreement or collusion, and therefore a contract for the facilitation of divorce was not enforceable here.

In the course of the argument Buckley L.J. gave several instances in which it would be impossible to assume that there was any general principle of public policy which would compel us to hold that the recovery of money lent for the purpose of gambling abroad was forbidden by the statute law of England. It is not possible to so hold, and the English Courts can only refuse to allow the recovery of such money where it has been lent for a purpose contrary not only to the statutes of this

(1) 8 D. M. & G. 731. (2) 8 D. M. & G. at p. 743.

country, but contrary also to the basis of morality which, irrespective of the statute law, is assumed to prevail in this country. I think therefore that this money is recoverable in this action.

I need not deal specifically with the question of the exact relations between the plaintiff and Brook, but I have no doubt that it was the habit of the plaintiff to act as the banker and of Brook to act as the spender of the moneys during their joint tour, and that the plaintiff came to be perfectly well aware that his travelling companion was, in the later years of their association, constantly gambling at the roulette table at Monte Carlo. Those are the facts at which I have arrived, but it is not necessary to deal with the question whether these moneys were advanced for the express purpose of gambling. In my opinion the decision of Bray J. must be upheld and the appeal dismissed.

BUCKLEY L.J. I am of the same opinion. With deference to the learned judge in the Court below, I feel some surprise that he should have thought upon the evidence that the money was not lent for the purpose of gaming. It is, however, unnecessary to decide that question. I shall assume in favour of the appellant that it was so lent.

Two propositions lie at the root of this case. The first is that the contract of loan was made at Monte Carlo and that the money was advanced for a purpose which at that place is legal. The second, which is of cardinal importance, is that by the common law of England gaming and wagering are not per se illegal. There are many statutes (some of them were recently considered by this Court in *Hyams* v. *Stuart King* (1)) which make certain gaming contracts and securities given in connection with gaming void and render the consideration for the contract illegal, but there is no principle of common law and no statute which makes betting or wagering in itself illegal. Coming then to the question of public policy, I cannot see that it is contrary to public policy for the English Courts to recognize a debt contracted for the purpose of wagering abroad in a place where such wagering was legal. The case of *Kaufman* v. *Gerson* (2) affords

(1) [1908] 2 K. B. 696. (2) [1904] 1 K. B. 591.

C. A. 1909

SAXBY v. FULTON.

Buckley L.J

one of the best illustrations of the law on this point. In the present case there is nothing, in *Kaufman* v. *Gerson* (1) there was a great deal, to lead this Court to refuse to enforce the contract on the ground that, although it was valid by the law of the country in which it was made, it was in contravention of an essential principle of justice or morality. The English Courts will not lend their aid to enforce such a contract. But a betting or gaming contract in a country where betting or gaming is recognized by the law cannot be said to be contrary to essential principles of morality or justice.

I may say a few words as to the statute of Anne and the Act of 1835. In 1710, when the statute of Anne was passed, gaming was not illegal. Sect. 1 of that Act provided as follows: "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever . . . ." The purpose of the section was this: it was thought that the mischief of gaming or betting with the money in one's pocket was not very great, but that the giving of promissory notes or the incumbering of one's estate at play was a very serious mischief, and therefore all such securities given for sums lost, whether in lawful or in unlawful games, were alike avoided. I pass over s. 2 of the Act of 1710, which has nothing to do with money lent. Coming to the Act of 1835, it is plain from the preamble that it was felt to be a hardship that, where a bill or note or other security had been given for a consideration arising out of a

(1) [1904] 1 K. B. 591.

gaming transaction, it should be void not only in the hands of the person to whom it was originally given, but also in the hands of a bona fide holder for value; therefore, in place of the avoidance of the bill or other security, the Legislature substituted the provision that it should be deemed to have been given for an illegal consideration. The Act of 1835 recognized that the innocent indorsee or bona fide holder for value suffered because the statute of Anne avoided the securities altogether, and it remedied this injustice. It has been argued that the effect of that Act was that the security was to be deemed to have been given for an illegal consideration not merely for the purpose of relieving the bona fide holder for value, but for all purposes, and that therefore it is not possible to sue upon the consideration. I do not agree with that view; I think the intention and effect was to prevent the claim of a bona fide holder for value being defeated in cases where it ought not to be.

The principal argument before us has been whether the effect of the Acts of 1710 and 1835 is to make the consideration, as well as the security, void. I do not think that that is the effect of those statutes, and this Court took the same view in *Moulis* v. *Owen*. (1) In that case Collins M.R., discussing the case of *Quarrier* v. *Colston* (2), said (3): "This case relates to the consideration only, and from what appears in the statement of facts there was nothing to found a presumption that the rights of the parties were to be ascertained by reference to the law of England, such as arose in *Robinson* v. *Bland* (4), from the fact that an English bill was given. It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England." And a little way further on he says, "The decision, therefore, in *Quarrier* v. *Colston* (2) in no way assists the respondent in this case, which turns on the validity of the cheque only." In that judgment Collins M.R. recognized that the decision in *Quarrier* v. *Colston* (2) proceeded on the footing that the view of the Act of 1835 that the consideration was made illegal for all purposes

(1) [1907] 1 K. B. 746.
(2) 1 Ph. 147.
(3) [1907] 1 K. B. at p. 751.
(4) 1 W. Bl. 234, 256; 2 Burr. 1077.

C. A. 1909

SAXBY v. FULTON.

Buckley L.J.

could not be maintained, and that it shewed that there was a difference between an action on the cheque and an action on the consideration. And Cozens-Hardy L.J. said in the same case (1), "In *Quarrier* v. *Colston* (2) there was no security, there was nothing upon which the Act of Anne or the Gaming Act, 1835, could operate." This means, of course, that those statutes cannot come into operation unless there is a security; they cannot defeat the consideration as distinguished from the security.

It must be remembered that in deciding *Moulis* v. *Owen* (3) the Court of Appeal were dealing with *Quarrier* v. *Colston* (2), which was decided by Lord Lyndhurst sitting in appeal, and was therefore a decision of a Court of co-ordinate jurisdiction. I think it plain that they did not mean to overrule it. The decisions in *Quarrier* v. *Colston* (2) and *Moulis* v. *Owen* (3) bind us sitting here. The former case is precisely analogous in its circumstances to the present case. *Moulis* v. *Owen* (3) affirmed the view that the statute of Anne and the Act of 1835 rendered a security given for a gaming debt or for money lent for the purpose of gaming illegal and void in the hands of the original holder wherever the gaming might have taken place. That is what the Legislature meant when it said that the security should be deemed to have been given for an illegal consideration. But a different question arises with regard to an action for money lent for a purpose lawful in the country where the loan is made, so that in that country there has been created the legal relation of debtor and creditor. In this Court I think we are bound to say that there is nothing contrary to public policy in allowing the enforcement of such a contract, and that there is nothing in any statute to disentitle the lender to recover. Here, as between the plaintiff and Brook, the relation of debtor and creditor was created, but the defendant contends that the borrower is not liable, because that which was perfectly legal in France could not legally have been done in this country. The answer to that contention was supplied by Lord Lyndhurst in *Quarrier* v. *Colston*. (2) For the reasons I have given I concur in the dismissal of this appeal.

(1) [1907] 1 K. B. at p. 756. (2) 1 Ph. 147.
(3) [1907] 1 K. B. 746.

KENNEDY L.J. I am of the same opinion. The plaintiff is suing the executrix of one Brook, alleging that the testator was liable to him in respect of money lent at Monte Carlo, and that he is entitled to maintain this action for its recovery. The defence, in substance, is that the money was advanced to Brook for the purpose of being used for gambling; and that, although, if proceedings to recover it were taken at Monte Carlo, a defence of illegality could not there be maintained, and the plaintiff would be entitled to recover, yet the lex fori prevents the plaintiff from recovering in this country because, either by virtue of express statutory enactments or on grounds of public policy, this action ought not to succeed. I agree that upon the evidence it is not possible to come to any other conclusion than that the bulk of the money was lent for the purpose of being used by the borrower for the purpose of gaming at the tables; it was in my judgment knowingly lent for that purpose within the meaning of the Gaming Act, 1710, and also within the meaning of the expression as construed in the decisions avoiding contracts on the ground of their being contrary to public policy, of which *Pearce* v. *Brooks* (1) is an example. Assuming, therefore, that the money was lent with knowledge of the purpose to which it was to be applied, ought we to hold the defence good on the ground either of statute or of public policy?

There is no doubt that generally by the law of England, when a contract is made abroad in a civilized country where it would be held to be a lawful contract, that contract is held to be governed by the lex loci contractus and is enforceable in personam in the Courts of this country. The law on this point is thus stated by Lord Mansfield C.J. in *Robinson* v. *Bland* (2): "The general rule established ex comitate et jure gentium is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract." Of course, if the parties can reasonably be found to have intended that some other law, as the law of the flag or the law of the domicil, is to govern their contract, the lex loci contractus is displaced as the governing principle. In the present case I see nothing in the facts sufficient to make the

(1) L. R. 1 Ex. 213. (2) 1 W. Bl. at p. 258.

C. A. 1909

SAXBY v. FULTON.

Kennedy L.J.

transaction in Monte Carlo one which by the intention of the parties was to be governed by the municipal law of England. It is true the settlement of accounts between the parties used to take place after their return to this country; but the same was the case in *Quarrier* v. *Colston* (1) and was not sufficient to defeat the plaintiff's right to maintain his action. I think that there is nothing in the facts of the present case to prevent the application of the lex loci contractus.

Mr. Atkin has sought to bring this case within another recognized exception to the general rule as to the application of the lex loci contractus. He has referred to the class of case in which the policy of the law in this country is such that we do not allow a contract which is good in the country of its making to be enforced in our Courts; of this class of case *Kaufman* v. *Gerson* (2) and *Hope* v. *Hope* (3) may be cited as examples. They are cases in which an element is present which may be summarized as something contrary to the morality of civilized nations, as we understand it. So in *Kaufman* v. *Gerson* (2), where there was a contract made in France, which was good by the law of France, but made as regards one of the parties under pressure and threats, it was held that it could not be enforced in the Courts of this country. There is nothing of that objectionable nature in a contract to lend money for the purpose of gambling. I entirely agree with Buckley L.J.; the borrowing and lending of money for the purpose of gaming is neither immoral nor unlawful at common law. It is suggested that morality is advancing, and that this is evidenced so far as to create a public policy by statutes which have been passed for the purpose of making some gambling transactions unlawful; but the answer is that these statutes really shew that the policy of the Legislature is to deal in a disciplinary fashion with certain particular manifestations of the gambling spirit, and do not establish a public policy which is contravened by any transaction connected with betting or games of chance. Reference was made to the more recent statutes of 1845 and 1892; but they relate to actual gaming transactions, and not to claims for repayment of money lent.

(1) 1 Ph. 147. (2) [1904] 1 K. B. 591.
(3) 8 D. M. & G. 731.

If we now turn to the recent authorities, it appears to me that certainly there is nothing in *Moulis* v. *Owen* (1), on which the defendant's counsel mainly relied, to justify his view. In that case the opinion of the majority turned, as Collins M.R. said, on the view that regard must there be had to the lex loci solutionis, because in a transaction which culminated in the giving of a cheque payable in England the question at issue ought to be regarded as governed by the law of England. At the outset of his judgment Collins M.R., after referring to the judgment of Lord Mansfield C.J. in *Robinson* v. *Bland* (2), which he adopted, said: "It in no way impugns the position that, when the rights of the parties to a security given for a gambling debt are to be ascertained by the law of England, the security cannot be enforced in England." In other words, apart from authority and going to the principle, we have a transaction the parties to which had agreed to treat the lex loci solutionis as the law by which it was to be governed; that is really the plain reason of the thing. In *Moulis* v. *Owen* (3) Cozens-Hardy L.J. puts the ground of his judgment in the same way when he says, "The result is that, in my opinion, the lex loci solutionis must be applied to this cheque, and the transaction must be treated as wholly subject to our local law."

So far as regards decided cases, the learned counsel for the defendant admitted that he could not treat *Moulis* v. *Owen* (1) as a decision directly in his favour, but he relied on the suggestion of incongruity which was thrown out by Cozens-Hardy L.J., if our law gives effect to a claim for repayment of a debt of this nature, but not to a claim on an instrument which is the security for such a debt. It seems to me that the majority of the Court of Appeal in that case refrained from giving any opinion as to the result of an action founded on the consideration, and they declined to give leave to the plaintiff to amend so that he might sue on the consideration for the cheque given in that case. In *Robinson* v. *Bland* (4) the clearest distinction is drawn between a claim on the security and a claim on the consideration. This distinction is partly based on the general inference, from the

(1) [1907] 1 K. B. 746.
(2) 1 W. Bl. 234, 256; 2 Burr. 1077.
(3) [1907] 1 K. B. 746, at p. 756.
(4) 1 W. Bl. at p. 259.

C. A. 1909

SAXBY v. FULTON.

Kennedy L.J.

fact of the bill or cheque being payable in England, that the transaction has reference to a contract to be determined by the principles of English law, and partly on the fact that, if the consideration is partly valid and partly invalid, it is easier to divide the consideration and to sue and recover upon that part of it which is good than it would be if the security itself were sued upon. In the considered judgment of the Court of Exchequer in *Applegarth* v. *Colley* (1) it was pointed out, with reference to the Act of 1835, that there was great difficulty in the way of holding that the consideration could be sued upon when the security admittedly could not. I should be very slow in venturing to dissent from the view expressed by that very strong Court, especially as they were approving of the view taken by the Court of Common Pleas in *Young* v. *Moore*. (2) But those judgments related only to transactions within this country to which the Gaming Acts apply; they cannot be conclusive authorities where the contract itself and the giving of a security are alike legal in the country where the contract was made. But it is not necessary further to consider the decided cases.

There is a fatal difficulty in the way of the defendant, in the decision in *Quarrier* v. *Colston* (3), which, even if we did not approve of it, this Court has no right to reverse. Whether it was right or whether it is open to the considerations impeaching its correctness which were suggested by Cozens-Hardy L.J. in *Moulis* v. *Owen* (4), it is impossible to treat it otherwise than as binding upon this Court and as exactly covering the facts in the present case. The debt had been contracted abroad in a country where the game played at was not illegal, and Lord Lyndhurst held that a claim for money lent to the defendant for the purpose of playing at that game was a claim upon which the lender was entitled to recover in this country. Even if that authority did not exist, it seems to me that the defendant could not succeed; but, with that authority confronting us, our judgment can only be that which has been already pronounced by the other members of this Court. On all grounds, therefore, in the present case, as

(1) 10 M. & W. 723.
(2) 2 Wils. 67.
(3) 1 Ph. 147.
(4) [1907] 1 K. B. 746.

C. A.
1909
SAXBY
v.
FULTON.
Kennedy L.J.

the debt was incurred in a country where it would be the subject of a good claim by the creditor, and is not one as to which we can hold on grounds of public policy that it is not governed by the lex loci contractus, or one to which *Moulis* v. *Owen* (1) applies, for there was no cheque or other security given from which it can be inferred that the lex loci solutionis was intended to govern the transaction, and as *Quarrier* v. *Colston* (2) is, as an authority, binding upon us, I agree that the judgment of Bray J. was right and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Adam Burn & Son.*
Solicitors for defendant: *Chester, Broome & Griffithes.*

W. J. B.

BROMLEY *v.* SMITH.

1909
Jan. 11, 12.

Master and Servant — Contract — Infant — Restraint of Trade — Severable Stipulations — Contract for Benefit of Infant — Injunction.

An infant's contract of service is not necessarily invalid because it contains stipulations some of which are void as being in restraint of trade and unnecessary for the protection of the master's business. If the void stipulations are severable from the rest of the contract they may be disregarded, and the rest of the contract is binding on the infant if it is for his benefit.

TRIAL of action before Channell J. without a jury.

The plaintiff carried on the business of a baker at Great Clacton, in the county of Essex. Part of Great Clacton has become known as Clacton-on-Sea and is a watering place consisting of a sea front along which are a number of lodging and boarding houses and shops. The plaintiff's practice was to send men with carts containing bread, which was in part sold to regular customers on whom his men called habitually and in part hawked about and sold to any persons who were disposed to buy it. The plaintiff did not himself go on these rounds, but attended to the business in the shop at Great Clacton.

In November, 1895, the plaintiff was in want of an assistant

(1) [1907] 1 K. B. 746. (2) 1 Ph. 147.

1909

BROMLEY v. SMITH.

to go daily with a horse and cart on a round, which he described as the town round. By means of an advertisement he got into communication with the defendant, a young man of the age of eighteen years, who lived at Great Baddow, in the county of Essex, and had been from the age of twelve years engaged in the bakery trade or business.

On November 18, 1895, the following agreement was entered into between the plaintiff and the defendant:—

"Agreement made this 18th day of November, 1895, between Henry Bromley of Great Clacton in the county of Essex, miller, baker, corn merchant, &c. (hereinafter called the master) of the one part and George Smith of Great Baddow (who is hereinafter referred to by the term the servant) of the other part Whereby the master in consideration of the engagement on the part of the servant hereinafter contained agrees to employ him as a baker and general assistant at his mills and bakeries in Great Clacton aforesaid at the remuneration of fifteen shillings per week and a commission of six pence in the pound for all ready money taken upon the following terms:—

"1. The servant will give his whole time and attention to the business of the said master during the hours of business and shall not whilst in the master's service be concerned in any other business or occupation and shall not nor will make known or divulge any of the business secrets or other private information but will at all times well and faithfully serve the master.

2. "The servant will obey and carry out the orders and requirements of the master whether such orders be given or stated in print, in writing, or verbally by the master.

"3. On breach of any or either of the above engagements on the servant's part or of any regulation order or requirement of the master or agent of the master it shall be lawful for the master by notice in writing delivered to the servant or sent to the servant by registered post letter forthwith to determine the servant's service.

"4. Either the master or the servant may terminate this agreement by fourteen days' notice in writing expiring on a Monday at 12 o'clock at noon delivered or sent by registered post as aforesaid to the other.

1909

BROMLEY v. SMITH.

"5. In consideration of the master taking the servant into the service of the master on the terms aforesaid the servant agrees that he will not at any time within the space of three years from the date of leaving the master's service either as principal, servant, agent, or otherwise be directly or indirectly engaged in any of the businesses of miller baker hay straw and corn merchant, &c., or engaged in the manufacture of flour meal bread or confectionery restaurant keeper or assistant to such either wholesale or retail within a radius of ten miles from Great Clacton."

The defendant continued in the service of the plaintiff until October, 1908, always going the same round. After the first two years of the service the agreement was modified in favour of the defendant as regards his remuneration. In August, 1898, the terms of the defendant's remuneration were again altered; but in other respects he continued in the plaintiff's service on the terms of the agreement of November 18, 1895. On October 9, 1908, the contract of service was determined by a week's notice given by the defendant to the plaintiff and accepted by the latter.

The defendant then agreed with one Green to take over a baker's shop at Little Clacton, at a distance of three miles from the plaintiff's premises, where he commenced to carry on the business of a baker and confectioner. Both before and after leaving the plaintiff's service he canvassed customers of the plaintiff, with the result that, as the defendant admitted, some forty of the plaintiff's old customers withdrew their custom.

At the date of the agreement the plaintiff did not carry on any business save that of a baker and confectioner; he was, however, meditating an extension of his business and contemplating the project of opening and keeping a restaurant. The defendant was only employed in going on the town round and in assisting in the baker's shop at Great Clacton.

On October 30, 1908, the plaintiff brought an action against the defendant in the county court of Essex, holden at Colchester and Clacton-on-Sea, claiming in his particulars of summons an injunction restraining the defendant for three years from October 9, 1908, from being engaged either as principal, servant, or agent or otherwise in the business of a baker or manufacturer

1909

BROMLEY v. SMITH.

of flour, meal, bread, or confectionery, wholesale or retail, at Little Clacton or elsewhere within ten miles from Great Clacton.

On November 2, 1908, the deputy county court judge granted an injunction restraining the defendant, his agents and servants and every of them, from carrying on the business of a baker and confectioner as described in the particulars of the summons until after the trial of the action or until further order.

By an order dated November 10, 1908, the action was by a writ of certiorari removed from the Clacton County Court into the High Court.

On November 24, 1908, an order was made that the injunction granted by the deputy county court judge should be and the same was thereby continued until the trial of this action or until further order.

The case now came on for trial in the King's Bench Division.

Hohler, K.C., and *C. E. Jones*, for the plaintiff. The plaintiff does not insist on an injunction in the terms stated in the particulars of claim in the county court. He claims an injunction restraining the defendant for three years from October 9, 1908, from being engaged either as principal, servant, or agent or otherwise in the business of a baker or confectioner at Little Clacton or elsewhere within ten miles from Great Clacton. He is entitled to an injunction in these terms. The restriction thereby imposed is necessary for the protection and preservation of the plaintiff's business. This business is very like that of a milk carrier, which has often come before the Courts: see for example *Cornwall* v. *Hawkins* (1); *Baines* v. *Geary* (2); *Fellows* v. *Wood* (3); *Evans* v. *Ware*. (4) If a contract for service contains a number of clauses in restraint of trade, some of which are, whilst others are not, reasonably necessary for the protection of the master's business, the contract is binding as to the former clauses provided they are severable from the latter: *Mallan* v. *May* (5); *Price* v. *Green* (6); *Baines* v. *Geary* (2); Smith's Leading Cases, 11th ed., vol. 1, pp. 428, 429, notes to *Mitchel* v.

(1) (1872) 41 L. J. (Ch.) 435.
(2) (1887) 35 Ch. D. 154.
(3) (1888) 59 L. T. 513.
(4) [1892] 3 Ch. 502.
(5) (1843) 11 M. & W. 653.
(6) (1847) 16 M. & W. 346.

Reynolds. (1) In the present case the covenant not to carry on the business of a baker or confectioner within ten miles from Great Clacton for a term of three years from October 9, 1908, may be severed from the other clauses in the agreement.

For this purpose it makes no difference that the servant was an infant when he entered into the agreement. The same principles apply; if the void clauses are severable the remaining clauses are binding on the infant, provided only that an agreement containing those clauses and no others would be for the benefit of the infant. This agreement, if the valid be separated from the void clauses, was for the benefit of the defendant when he entered into it, in that it enabled him on reasonable terms to learn a trade and earn his living: *Leslie* v. *Fitzpatrick* (2); *Cornwall* v. *Hawkins* (3); *Fellows* v. *Wood* (4); *Evans* v. *Ware.* (5)

J. A. Hamilton, K.C., and *Morten*, for the defendant. As between persons of full age the rule is well established that an agreement containing clauses in restraint of trade, some of which are reasonable and valid while others are unreasonable and void, may be binding on the promisor as to the reasonable clauses provided these can be severed from the unreasonable. But that rule does not apply where the promisor is an infant. The contract is not binding on the infant unless it is for his benefit; if it contains stipulations which are so much to the detriment of the infant as to render it unfair that the infant should be bound by them, then the whole contract is void: *Meakin* v. *Morris* (6); *Corn* v. *Matthews* (7); *Green* v. *Thompson.* (8) The contract must be looked at as a whole in order to see whether it contains stipulations so much to the infant's detriment as to make them unfair having regard to all the other clauses. If the contract contains such stipulations, it is void as a whole, and none the less because the stipulations are so unfair that they would not even be binding on a man of full age. The only business of the master which required protection here was the retail bakery and confectionery business, yet the defendant was restrained from

(1) (1711) 1 P. Wms. 181.
(2) (1877) 3 Q. B. D. 229.
(3) 41 L. J. (Ch.) 435.
(4) 59 L. T. 513.
(5) [1892] 3 Ch. 502.
(6) (1884) 12 Q. B. D. 352.
(7) [1893] 1 Q. B. 310.
(8) [1899] 2 Q. B. 1.

1909

BROMLEY v. SMITH.

being in any wise engaged in any of the businesses, either wholesale or retail, of a miller, baker, or hay, straw, and corn merchant or manufacturer of flour, meal, bread, or confectionery, or in the business of a restaurant keeper or assistant to a restaurant keeper. Such a stipulation makes the whole contract void within the principle of the cases cited above.

Hohler, *K.C.*, in reply.

CHANNELL J. The question which I have to decide is whether the agreement of November 18, 1895, is binding upon the defendant. The law on this subject has been laid down in general terms in a number of cases. A man cannot restrict himself in the future exercise of his work and labour unless there is good reason for so doing. One principle which has been recognized as a good reason for a man restricting himself in this way is that the restriction is necessary for the protection of the person for whose benefit it is imposed.

The plaintiff at the outset asserts that the restriction he seeks to impose was necessary for the protection of his business. That was not the business of a baker and confectioner as generally known; it is much more like another business in which restrictive agreements of this kind are almost universal, namely, that of a milk carrier, in which the servant goes round to the master's customers to whom the servant becomes known and with whom he forms a connection which the master cannot do. In that case, as in the present, if the master wants to protect himself he must impose some restriction upon the servant when he leaves or is about to leave the service. If the necessity for some restriction in the present case was not obvious from the beginning, it became so when the plaintiff alleged that one hundred and when the defendant admitted that forty customers of the plaintiff had withdrawn their custom owing to the exertions of the defendant.

But then the restriction must coincide with what is necessary for the protection of the master's business. In this case the restriction imposed by the contract is very wide. In some businesses it is necessary that the restriction should be limited in time and space; in the present case it is so limited, and, so

far as that goes, it is reasonable. But it seeks to restrain the defendant from entering into employments which on the face of them do not seem to interfere with the plaintiff's business or afford facilities for seducing the plaintiff's customers. The reason why he sought to impose these restrictions was that he was minded to develop and extend his business and entertained the project of opening and keeping a restaurant. If the agreement had been one for service not only in the business which the plaintiff was then carrying on, but also in the business which he was contemplating, and the service had been in the future business as well as in that existing at the date of the agreement, these restrictions might or might not have been reasonable; but as the defendant was only engaged for the business carried on at the date of the agreement, it is unreasonable that he should be restrained from engaging, for example, in the business of a restaurant keeper, in which he could do no harm to the plaintiff. In my opinion, therefore, this agreement, in so far as it seeks to restrain the defendant from engaging in the business of a restaurant keeper, goes beyond what was necessary for the protection of the business carried on by the plaintiff in supplying bread on a round.

Then comes the question whether this unenforceable restriction vitiates the whole agreement. It is well settled that, if the void portion is severable from the valid portion, the agreement is binding as to the valid portion. That is a rule which it is easy to enunciate but often difficult to apply. But in the present case I think the agreement can be severed in the way proposed by Mr. Hohler. Each of the prohibited trades or businesses is specified separately. There is the business of a hay, straw, and corn merchant; that is self-contained and severable: so as to the manufacture of flour and meal, and similarly the business of a restaurant keeper or assistant to such; each of these businesses are separate and severable. Protection is not wanted against the defendant engaging in any of these businesses. There was no secret process for which the plaintiff required protection in the making of his bread. Accordingly, if this was the case of an adult entering into an agreement in these terms, I should grant an injunction restraining him for the space of three

1909

BROMLEY v. SMITH.

Channell J.

years from October 9, 1908, from becoming, either as principal, servant, agent, or otherwise, directly or indirectly engaged in the business of a baker or in the manufacture of bread or confectionery within a radius of ten miles from Great Clacton.

Then the question arises, would this contract, if so limited, be binding on an infant? There is abundant authority that contracts for service may be binding on infants although they contain restrictive terms. A contract which contains the only terms on which an infant can reasonably expect to get employment must, I think, be for his benefit. The defendant could not get employment in the plaintiff's or any other similar business on any better terms than those I have suggested, and I think it was for his benefit to get employment on those terms; by entering into the plaintiff's service on those terms he was only giving up the chance of setting up in business in a place where he was not known, and it is quite right that when leaving that service he should forgo the right of soliciting customers whom he would never have known but for that service. Common honesty demands that forbearance.

The only difficulty is in the argument put by counsel for the defendant, which may be put interrogatively in this way: Given an agreement in other respects reasonable and for the benefit of an infant, is that agreement binding when in addition to the reasonable terms there are inserted clauses which are inoperative? It is said that, being an infant, the defendant could not say whether they were inoperative or binding, and that the ascertainment of his liability or immunity under those clauses is likely to involve him in the expense of having to take legal advice or perhaps of having to become party to a lawsuit. Does that consideration make this whole contract an unfair one and one which as a whole is not for the benefit of the infant? That depends upon what is meant by certain words used by the Court of Appeal in *Corn* v. *Matthews*. (1) Lord Esher M.R. there said (2): "The mere fact of some conditions in the deed being against the apprentice does not enable the Court on that ground only to say that the agreement is void. It is impossible to frame a deed, as between a master and an apprentice, in which some of the

(1) [1893] 1 Q. B. 310. (2) [1893] 1 Q. B. at p. 314.

stipulations are not in favour of the one and some in favour of the other. But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void. The stipulation which is objected to must be so unfair that it makes the whole contract as between the apprentice or the infant and the master an unfair one to the infant." What is meant by the phrase "the whole contract"? If what is meant is the contract as one entire piece of paper with all its clauses, good and bad, it would follow that this contract would not bind the defendant, because it contains stipulations which would, if they were enforceable, make the whole contract unfair. But is that what is meant? Do these stipulations make the whole contract unenforceable? I do not think they do. I think that the Court, when speaking of the whole contract, meant the whole contract so far as it was operative, and that those stipulations may be disregarded which would be disregarded where the party was not an infant, but a person of full age. This contract, excluding those stipulations which are inoperative, imposes upon the defendant the obligation that, when he gives up the service, he shall not take advantage of the employment, and the acquaintance he has made by means of it with customers of the plaintiff, to set up in business and solicit the customers of his late master in a place where he himself had no connection and never would have had any connection if he had not been in the service of the plaintiff. Omitting the invalid restrictions to which I have referred, I think the contract with this restriction was on the whole for the benefit of the defendant and was therefore binding upon him. For these reasons I think the plaintiff is entitled to an injunction in the terms proposed by Mr. Hohler.

Injunction granted accordingly.

Solicitors for plaintiff: *Kingsford, Dorman & Co., for Elwes, Leaming & Chamberlayne, Clacton-on-Sea.*

Solicitors for defendant: *Tarry, Sherlock & King, for Turner, Turner & Martin, Ipswich.*

W. H. G.

C. A.
1909
April 2.

[IN THE COURT OF APPEAL.]

PITTS, APPELLANT *v.* MICHELMORE, RESPONDENT.

Parliament—Franchise—Rating—Successive Occupation—Representation of the People Act, 1832 (2 *& 3 Will.* 4, *c.* 45), *ss.* 27, 28, 30—*Representation of the People Act*, 1867 (30 *& 31 Vict. c.* 102), *ss.* 3, 26, 56, 59—*Poor Law Amendment Act*, 1868 (31 *& 32 Vict. c.* 122), *s.* 38.

The appellant, who was on the occupation list of voters, was the inhabitant occupier, during the whole of the qualifying period from July 15, 1907, to July 15, 1908, of two dwelling-houses in immediate succession. He occupied the first house until June, 1908, when he went into occupation of the second house. He was rated and paid all the rates due in respect of the first house, but, inasmuch as the building of the second house was not completed in April, 1908, when the rate for the half-year ending September 29, 1908, was made, the house was not entered in the rate-book, and no one was rated in respect thereof until after the termination of the qualifying period, and no claim to be rated in respect thereof nor tender or payment under s. 30 of the Representation of the People Act, 1832, of the sum which would have been due had he been rated was ever made by the appellant:—

Held by Buckley L.J. and Kennedy L.J. (Joyce J. doubting), that the appellant was not entitled to the franchise under ss. 3 and 26 of the Representation of the People Act, 1867.

Decision of Divisional Court, [1909] 1 K. B. 227, affirmed.

APPEAL from the judgment (1) of a Divisional Court (Lord Alverstone C.J., Walton J., and Sutton J.) upon a case stated by the revising barrister for the Torquay division of the county of Devon.

At Courts holden on September 9, 11, and 12, 1908, at Torquay, Brixham, and St. Marychurch, objection was duly taken to the names of Frederick William Pitts and six other persons, whose names were scheduled to the case, being retained on division 1 of the occupiers' lists of their respective parishes on the ground that they had not been rated in respect of the qualifying premises during the whole of the qualifying period of occupation in accordance with the provisions of s. 3 of the Representation of the People Act, 1867.

Pitts occupied during the whole of the qualifying period in immediate succession as dwelling-houses premises known as

(1) [1909] 1 K. B. 227.

10, Peditford Terrace, Torquay, in the parish of Tormoham, and 3, Alexandra Terrace, Torquay, in the same parish, and had been duly rated and had paid all rates due in respect of the first-named premises.

Pitts came into the occupation of 3, Alexandra Terrace in June, 1908; the then current rate for the parish had been made on April 6 preceding for the period ending September 29, 1908, but, by reason of the fact that on the date of the making of the rate the premises were unfinished, no one was then rated in respect thereof, and in fact no one was rated in respect thereof between the commencement of Pitts' occupation and the termination of the qualifying period.

No claim to be rated in respect of the premises 3, Alexandra Terrace and no tender or payment under the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 30, and the Parliamentary Electors Registration Act, 1868 (31 & 32 Vict. c. 58), s. 30, of the sum which would have been due had he been rated were ever made by Pitts.

With regard to the six other scheduled cases, in one of them the facts were similar to those in Pitts' case; and in the remaining five cases the facts were also similar to those in Pitts' case, with the following qualifications. In two of the cases the persons objected to in fact paid the sums which would have been due had they been rated on a date subsequent to the termination of the qualifying period as from the commencement of their occupation, and in the other three cases the overseers, on dates subsequent to the termination of the qualifying period, inserted the names in the current rates in pursuance of the powers conferred upon them by s. 38 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), and charged them and were in fact paid by them in full, after the termination of the qualifying period, the sums due from the date of their going into occupation of the premises.

The revising barrister held that none of the above-mentioned persons were entitled to have their names registered on the respective lists and expunged their names therefrom.

If the Court should be of opinion that his decision was wrong, the names were to be restored to the lists.

C. A. 1909

PITTS v. MICHELMORE.

The Divisional Court affirmed the decision of the revising barrister.

F. F. Daldy, for the appellant. It was made necessary, no doubt, in regard to the qualification by continuous occupation of the same dwelling-house under s. 3 of the Representation of the People Act, 1867, that the occupier should have been rated to all rates, if any, made in respect of the premises during the qualifying period. By s. 26 of that Act the occupation of different dwelling-houses in immediate succession during the qualifying period has the same effect as regards the inhabitant occupier franchise as the continued occupation of the same dwelling-house. Sects. 56 and 59 of the Representation of the People Act, 1867, however, apply, as nearly as circumstances admit, the provisions of the Representation of the People Act, 1832, to the franchise created by the Act of 1867. Therefore it is necessary to refer to the provisions of s. 28 of the Act of 1832, which relates to successive occupation under that Act. It was provided in effect by that section that the occupation of different premises in immediate succession during the qualifying period should qualify, the only condition being that the occupier should have paid on or before July 20 all the poor's rates and assessed taxes which should previously to the 6th day of April—now January 5—then next preceding have become payable from him in respect of all such premises so occupied by him in succession. It was held in *Rogers* v. *Lewis* (1), under the Act of 1832, and in *Moger* v. *Escott* (2), under the Act of 1867, that in the case of successive occupation it was not necessary that the claimant of the vote should have been rated in respect of the second house, provided he had on or before July 20 paid all rates which had become payable from him in respect of the premises as required by the condition in s. 28 of the Act of 1832. *Palmer* v. *Wade* (3) is distinguishable from the present case. There the second house appears to have been omitted, though rateable, from a rate made during the occupation of the person claiming the vote. In that case the Court followed the decision of the Court of Appeal in Ireland in *M'Gaffigan* v.

(1) (1859) 7 C. B. (N.S.) 29. (2) (1872) L. R. 7 C. P. 158.
(3) [1894] 1 Q. B. 268.

Riddall (1) upon similar facts. In the present case the April rate was made before the second house became rateable, it being then unfinished, and before the appellant went into occupation of it. The house therefore was not on the rate-book, and there was no rate to which it could have been rated until after the expiration of the qualifying period. Sect. 3 of the Act of 1867 only requires that the premises shall have been rated to all rates, "if any," made for the relief of the poor in respect of such premises. There was really here no rate made, so far as the second house was concerned, during the qualifying period. The second house would not be in the valuation list on which the April rate was made, and it would often be impossible in such a case to get the house rated during the qualifying period. In similar circumstances it was held by the Court of Appeal in Ireland in *Criglington* v. *Anderson* (2) that the occupier was qualified: see also *Riddall* v. *M'Aleer.* (3)

It is submitted that the effect of the decisions in *Rogers* v. *Lewis* (4) and *Moger* v. *Escott* (5) is really to shew that, in the case of successive occupation, there is no necessity for the second house to be rated, or even to be rateable, provided that the occupier has complied with the condition imposed by s. 28 of the Act of 1832, namely, that he should have paid all rates which had become payable from him up to January 5. No distinction can really be drawn between Pitts' case and the other scheduled cases. [He also cited *Gallagher* v. *Chambers* (6), *Devine's Case* (7), *Torish* v. *M'Cormack* (8), *Olley's Case* (9), *Bell* v. *Black* (10), *M'Cartney* v. *Black* (10), *Owens* v. *Hanrahan* (11), *Drugan* v. *Buchanan* (7), and *Cull* v. *Austin.* (12)]

No one appeared for the respondent.

BUCKLEY L.J. In this case the appellant's counsel has suffered from the inconvenience of having no opponent, but the Court

(1) (1890) 28 L. R. Ir. 257.
(2) (1889) 26 L. R. Ir. 131.
(3) (1890) 28 L. R. Ir. 257, at p. 260.
(4) 7 C. B. (N.S.) 29.
(5) L. R. 7 C. P. 158.
(6) (1892) Lawson's Reg. Cas. 1885 to 1893, p. 138.
(7) (1885) Lawson's Reg. Cas. 1885 to 1893, p. 128.
(8) (1889) Lawson's Reg. Cas. 1885 to 1893, p. 144.
(9) (1888) Lawson's Reg. Cas. 1885 to 1893, p. 214.
(10) (1888) 22 L. R. Ir. 591.
(11) (1889) 26 L. R. Ir. 418.
(12) (1872) L. R. 7 C. P. 227.

C. A. 1909

PITTS v. MICHELMORE.

Buckley L.J.

has not suffered, for Mr. Daldy has so clearly called our attention to all the authorities bearing on the question, and discussed them so fully in all their bearings, that, although the subject is a tangled one, I do not think that we should derive any benefit from reserving our judgment.

The decision of the Court is invited with regard to seven cases, but, inasmuch as counsel has admitted that he cannot discriminate between the case of the appellant Pitts and any of the other cases, by reason of any difference in their facts, it will be sufficient for the purposes of my judgment to deal with Pitts' case.

The facts of that case were as follows. During the qualifying period the appellant occupied in succession two houses. First he occupied a dwelling-house known as 10, Peditford Terrace, Torquay, in the parish of Tormoham. He had been duly rated and had paid all rates due in respect of that house. In June, 1908, he came into occupation of the second house, No. 3, Alexandra Terrace, Torquay, in the same parish. At that time there was a current rate for the parish, which had been made on April 6 preceding for the period ending September 29, 1908, but, by reason of the fact that at the time of the making of that rate the house was unfinished, it was not then entered in the rate-book, and no one was then rated in respect of it, and, in fact, no one was rated in respect of it between the commencement of Pitts' occupation and the termination of the qualifying period; and, no one having been rated, no rate was paid in respect of the house for that period. The question in this case is whether under these circumstances the appellant Pitts was qualified for the franchise under s. 3 of the Representation of the People Act, 1867.

In order that a man may be entitled to the franchise under that section four qualifications are required: he must be qualified (1.) by age and absence of legal incapacity; (2.) by occupation of a dwelling-house; (3.) by what I will call the "qualification by liability in respect of rates"; and (4.) by the discharge of that liability to a limited extent by payment, which I will call the "qualification by payment of rates." There is no question that the appellant was qualified as regards the first of those qualifications, namely, age and capacity, and the second,

namely, occupation, and the fourth, by payment of all rates which had become payable from him during the qualifying period down to January 5. The only question is whether he was qualified as regards the third qualification, which is thus expressed: "Has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him . . . . to all rates, if any, made for the relief of the poor in respect of such premises." In relation to this question it is necessary also to consider the provisions of s. 26 of the Act of 1867, which deals with successive occupation, and provides that "different premises occupied in immediate succession by any person as owner or tenant during the twelve calendar months next previous to the last" (now the 15th) "day of July in any year shall, unless and except as herein is otherwise provided, have the same effect in qualifying such person to vote for a county or borough as a continued occupation of the same premises in the manner herein provided." It is to be observed that the language of that section deals only with qualification by the occupation of premises, as to which it provides in effect that, for the purposes of s. 3, sub-s. 2, the occupation of different premises in immediate succession shall have the same effect as the continued occupation of the same premises. Sect. 59 of the Act of 1867 brought in for certain purposes the provisions of the Representation of the People Act, 1832, and among them ss. 27 and 28 of that Act. In *Moger* v. *Escott* (1) Brett J., as he then was, discussed these sections and, after pointing out that to which I have just called attention with regard to the effect of s. 26 of the Act of 1867, ultimately expressed the conclusion at which he arrived in these words: "In such cases," that is to say, cases of successive occupation, "the occupier may be registered, if he has been rated, and has paid all rates in respect of the first house, and has paid all rates payable in respect of the second house, though he has not been rated in respect of it." The appellant's counsel has argued that these observations were addressed not to sub-s. 3 of s. 3, which concerns the qualification by liability in respect of rates, but to sub-s. 4, which requires the qualification by payment of rates. I do not so understand them. I think that

(1) L. R. 7 C. P. 158.

C. A. 1909

PITTS v. MICHELMORE.

Buckley L.J.

the effect of *Moger* v. *Escott* (1) is this: it being true that the provisions of ss. 27 and 28 of the Act of 1832 are to be brought into the Act of 1867 by virtue of s. 59 of that Act, the result is that, as regards qualification by liability in respect of rates, a person who has come by way of succession from other premises into the occupation of premises in respect of which rates have been made, but who has not himself been rated in respect of them, is nevertheless, if he has paid those rates, as much qualified as if he had been the person rated.

To shew how this has arisen I go back to *Rogers* v. *Lewis* (2), which was decided in 1859 upon the Representation of the People Act, 1832. The facts there were these. The premises occupied by the claimant in succession from other premises were on the rate-book; they had been rated; the claimant had not himself been rated in respect of them; he had, however, paid the rate. What was there held was, I think, that, in the case of premises occupied in succession under the Act of 1832, which had been rated, it was not necessary that the name of the person claiming the franchise should appear in the rate-book in respect of those premises; it was enough that he should have paid the rate. If the language of Erle C.J. in that case is examined, it appears to me plain that the effect of what he said is this. He was discussing the question whether the person claiming the vote was qualified by reason of having come under the liability to pay rates in respect of premises occupied in succession from others, and he said that in the case of premises occupied in succession it might often be difficult, or even practically impossible, for an occupier to get his name put upon the rate-book in respect of those premises, but that this difficulty might nevertheless be got over under the Act if, notwithstanding that he had not been rated, he could shew that he had in point of fact paid the rate. I do not think that in what Erle C.J. said he was referring to the other qualification, which was required by the Act of 1832 as it is by the Act of 1867, namely, that the claimant should have discharged the liability to a certain extent by payment of rates due down to a certain date. I think that he was discussing, not that qualification,

(1) L. R. 7 C. P. 158. (2) 7 C. B. (N.S.) 29.

but the qualification by liability in respect of rates, and saying that, though the person claiming the vote had not himself been rated in respect of the premises occupied in succession from others, that qualification might be satisfied by shewing that he had paid the rate in respect thereof. What *Rogers* v. *Lewis* (1) decided, in my opinion, was that, where the premises occupied in succession were on the rate-book, though the claimant of the vote had not himself been rated in respect of them, yet, if he had paid the rate, he was in as good a position as if he had himself been rated in respect of them. The fact that the occupier had paid the rate in that case was, I think, treated as material, not in relation to the qualification by payment of rates, but the qualification by liability to pay them. *Rogers* v. *Lewis* (1) was decided in 1859 on the Act of 1832. *Moger* v. *Escott* (2) was decided in 1872 upon the Act of 1867 in the same way upon very similar facts, and the only point upon it is that to which I have already called attention, namely, as regards the introduction into the Act of 1867 by s. 59 of that Act of s. 28 of the Act of 1832.

The second point with which I wish to deal is this. Sect. 3, sub-s. 3, of the Representation of the People Act, 1867, concludes with the words "to all rates, if any, made for the relief of the poor in respect of such premises."

As regards the house No. 3, Alexandra Terrace, no rate had been made in respect of it. It was a new house; it was not in the rate-book, and no one was entered on the rate-book as being a person chargeable in respect of it. It was said that there were authorities in Ireland to the effect that the words "if any," &c., meant if any rates were laid upon the particular house which was alleged to constitute the qualifying property. In *Criglington* v. *Anderson* (3) the Master of the Rolls in Ireland did, in giving judgment, certainly lay it down that this was the meaning of the words. To me it is a singular fact that Fitzgibbon L.J., who was a member of the Court which decided that case, assented to the judgment delivered by the Master of the Rolls, for in *Owens* v. *Hanrahan* (4), reported in the same volume,

(1) 7 C. B. (N.S.) 29.
(2) L. R. 7 C. P. 158.
(3) 26 L. R. Ir. 131.
(4) 26 L. R. Ir. 418.

C. A. 1909

PITTS v. MICHELMORE.

Buckley L.J.

and decided on the next day, he said: "It seems to me that the words in s. 3, sub-s. 3, of the Act of 1867—'to all rates, if any, made for the relief of the poor in respect of such premises' during the qualifying period—were intended to provide against a man's being disfranchised by the fact that, though he occupied a rateable hereditament, no rate was made during the qualifying period"; meaning (as I understand) not that the premises in question had not been included in the rate-book, but that no rate had been made during the qualifying period in the parish in which the premises were situate. Again, in *M'Gaffigan* v. *Riddall* (1), in which case Fitzgibbon L.J. delivered the principal judgment, he gave, as it seems to me, detailed reasons why the meaning attributed in *Criglington* v. *Anderson* (2) to the words "all rates, if any," &c., was erroneous. If the meaning given to the words in *Criglington* v. *Anderson* (2) were correct, it would follow, as it seems to me, that, if a man during the qualifying period occupied a rateable house, which the overseers by an oversight had omitted to include in the rate, and upon which no rate had been laid, he would be qualified, although in point of fact he had never been rated. I think that a perfectly impossible conclusion. I read the words "if any" in sub-s. 3 as meant to meet a case where, during the qualifying period, no rate has been made which could have affected the premises in question, and to provide that in such a case a person shall not be disfranchised by reason of the fact that owing to the affluence of the parish, or no money having been wanted, it had not been necessary to make any rate for the parish. It appears to me to be impossible to hold that these words apply so as to enable the appellant here to say that, no rate having been made on No. 3, Alexandra Terrace during the period of his occupation, in the sense that the house was omitted from the rate-book, he has satisfied the conditions of s. 3, sub-s. 3, of the Act of 1867. The case of *M'Gaffigan* v. *Riddall* (1) has been followed by the Divisional Court in *Palmer* v. *Wade* (3), where Lord Coleridge C.J. held the decision in that case to have been right. He said in giving judgment: "I was

(1) 28 L. R. Ir. 257. (2) 26 L. R. Ir. 131.
(3) [1894] 1 Q. B. 268.

inclined to think that the revising barrister was right as to both matters. But the case of *M'Gaffigan* v. *Riddall* (1) in the Court of Appeal in Ireland is a clear authority that he was wrong in regard to the parliamentary franchise. The head-note is: 'The inhabitant occupier, during the whole or part of the qualifying period, of a dwelling-house which was rateable, and ought to have been rated, but was not rated for the relief of the poor to a rate which was made during the qualifying period, and during his occupation, is not entitled to the franchise.' That is simply this case." It appears to me that this is the proposition which was laid down in Ireland and approved by the Court in that case, and that it is perfectly well founded.

The result is that the appellant, who has been, during part of the qualifying period, an inhabitant occupier of premises which were not, and in respect of which he was not, rated to the current rate, and who has not paid the current rate, cannot say that he is qualified. The fact that he has paid all rates due from him down to the preceding 5th of January, that is, has complied with s. 3, sub-s. 4, of the Act of 1867, does not shew that, as regards the premises occupied by him during the latter part of the qualifying period, he has fulfilled the condition imposed by s. 3, sub-s. 3. For these reasons I think that the judgment of the Divisional Court was right and this appeal must be dismissed.

KENNEDY L.J. I am of the same opinion. The appellant's counsel has put before us in a very full and lucid manner, and as impartially as an advocate properly could, all the authorities which bear upon this question, and the reasons for and against his contention. After considering the arguments which he has brought forward, I have come clearly to the conclusion, notwithstanding the fact that there are a number of decisions in Ireland which, I must say with the greatest respect for the Courts by which they were pronounced, do not appear to me to be all reconcilable with one another, that the appeal fails and the judgment of the Divisional Court must be affirmed. I need not go through the sections, or refer in detail to the cases which have

(1) 28 L. R. Ir. 257.

C. A. 1909

PITTS v. MICHELMORE.

Kennedy L.J.

been already dealt with by my brother Buckley L.J., but, as the matter is one of importance, I wish in a few words to put broadly the view which I am disposed to take. In the legislation with which we are dealing, that is to say, the Act of 1867 and the subsequent Acts which have qualified or added to its provisions, taken together as a whole, the intention appears to me to be that the claim to the franchise of the inhabitant occupier of a dwelling-house should be based upon the occupation by him during a period of twelve months either of one rateable hereditament continuously, or of two or more rateable hereditaments in succession. It seems to me that it would be strange if it were provided that, in the case of continuous occupation of one dwelling-house during the qualifying period, there must be, either directly or indirectly through the owner of the qualifying premises, a continuous liability in respect of rates, but, in the case of successive occupation of two or more dwelling-houses, which is to be regarded as an equivalent for the continuous occupation of one, it were provided—as would, as the appellant's counsel was obliged to admit, be the result of his argument—that, if a man had occupied during part of the qualifying period a dwelling-house which was rateable, and had paid in respect of it all rates which had become due up to January 5, he should be entitled to the franchise if he has resided during the rest of the qualifying period in a house which was not on the rate-book at all, and which he occupied not merely without paying any rates in respect of it, but without being liable to any rates in respect of it. I cannot find in any of the cases any authority for such a proposition. There has been a suggestion, no doubt, made, which is referred to in Rogers on Elections, 16th ed., p. 128, that, as regards the second house occupied in succession, provided the occupier had paid all rates due from him up to January 5, the liability to payment of rates might not be requisite in the case of a ruinous place of residence, or one which had been so recently completed that it had not come into a valuation list nor into the rate-book during the qualifying period. The head-note in *Palmer* v. *Wade* (1) runs thus: "The inhabitant

(1) [1894] 1 Q. B. 268.

occupier of a dwelling-house, which, 'though rateable,' has not been rated to a poor rate made during the qualifying period, and in respect of which such rate has not been paid, is not entitled to either the parliamentary or the municipal franchise." I do not think the question there would have been entertained at all if the voter had been the inhabitant occupier of a dwelling-house which was not rated by reason of its not being a rateable subject-matter. The difficulty arose there because there had been no actual rating of the inhabitant occupier of the dwelling-house, though the house was rateable, and therefore in that particular case of course no rate was paid. I think the law as quoted by Lord Coleridge C.J. in *Palmer* v. *Wade* (1) from the judgment of Fitzgibbon L.J. in *M'Gaffigan* v. *Riddall* (2) is right: "This enactment"—he was referring to s. 9, sub-s. 9, of the Representation of the People Act, 1884—"seems to me to imply that, except in the case of exempt premises, no one is entitled to be registered in respect of any dwelling-house for which no one is rated, and no rates are paid; and it would be unmeaning to require the name of the 'inhabitant occupiers' of 'exempt premises' to be entered on the rate-book, if rating was not in all other cases essential to the franchise." It seems to me that, in the case of the premises here in question, as was pointed out in the judgment in the Divisional Court, there were provisions by which the appellant might, if he had taken the proper steps, by application to the overseers, have got his name placed on the rate-book, but no such steps were taken by him. In my opinion the decision of the Divisional Court, following as it does the judgment in *Palmer* v. *Wade* (1), which again followed the decision in *M'Gaffigan* v. *Riddall* (2), to the effect that the second of the houses successively occupied must be rated to all rates made during the period of the voter's occupation, is right, and that to decide otherwise would involve a proposition which, upon the authorities and the true construction of the statutes on the subject, would be untenable, namely, that in a case of successive occupation the claim to the franchise would be good, provided all rates due from the claimant had been paid up to January 5, although the second house not only had not been rated to rates made during his occupation of

(1) [1894] 1 Q. B. 268. (2) 28 L. R. Ir. 257.

C. A. 1909

PITTS v. MICHELMORE.

it, but could not be so rated on account of its condition or character.

JOYCE J. The Lords Justices have each of them formed a clear opinion that this appeal should be dismissed, and in that state of things what my own opinion may be is not of much practical importance, but at the same time I must say that I am not completely satisfied that the decision of the Divisional Court was correct. I venture to think that the proper way of dealing with this question is to examine the provisions of the Acts of Parliament, without allowing one's mind to be confused by the numerous conflicting decisions on the subject which are not binding on this Court. I cannot help thinking that the Lord Chief Justice came to the conclusion at which he arrived in the Court below by reading into s. 28 of the Representation of the People Act, 1832, certain words which are not to be found in that section, and I think that the result is unfortunate, because it appears to me to have the effect of excluding from the franchise persons who possessed the substance of the qualification for it, and who, I am disposed to think, on a literal construction of the Acts, might have been placed upon the register.

Appeal dismissed.

Solicitors for appellant: *Brooks, Jenkins & Co., for C. H. Clode, Torquay.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 5.

HANRAHAN *v.* LEIGH-ON-SEA URBAN DISTRICT COUNCIL.

Local Government—Building—Conversion of Building into Dwelling-house—"New Building"—Breach of By-law—Right to remove, alter, or pull down Building—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 159.

By s. 157 of the Public Health Act, 1875, every urban authority may make by-laws with respect to (inter alia) the structure of new buildings, and may provide for the observance of those by-laws by enacting therein such provisions as they think necessary as to the power of the authority to remove, alter, or pull down any work begun or done in contravention of the by-laws. By s. 159 of the above-mentioned Act, "for the purposes of this Act . . . . the conversion into a dwelling-house of any building not originally constructed for human habitation . . . . shall be considered the erection of a new building."

By a by-law made by an urban council it was provided that, if any work to which any of their by-laws relating to new buildings might apply were begun or done in contravention of any such by-law, the person by whom the work was so begun or done, by a notice in writing, should be required to shew sufficient cause why the work should not be removed, altered, or pulled down; and, if he failed to do so, the council should be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work.

The owner of an old railway carriage, which stood upon a plot of land within the district of the above-mentioned urban council belonging to him, converted it into a dwelling by removing the seats, making an opening through a partition inside, putting in a stove and chimney, and erecting an earth closet outside it, and then resided in it with his wife and children. The structure thus formed did not comply with the by-laws relating to new buildings made by the urban council under s. 157 of the Public Health Act, 1875. The urban council, after due notice to the owner, pulled down the whole building:—

Held (affirming the judgment of a Divisional Court), that the whole structure, when converted into a dwelling-house, became, by virtue of s. 159 of the Public Health Act, 1875, a new building subject to the by-laws relating thereto, and, as it did not comply with the requirements of those by-laws, the urban council had power to pull down the whole building, and not merely to remove and alter the work by which it was so converted as aforesaid.

APPEAL from the judgment (1) of a Divisional Court (Bigham and Walton JJ.) upon an appeal from the county court of Essex holden at Southend.

(1) [1909] 1 K. B. 263.

C. A. 1909

HANRAHAN v. LEIGH-ON-SEA URBAN COUNCIL.

The action was brought to recover damages for trespass and conversion. The plaintiff in August, 1907, purchased a plot of land within the district of the defendant council. At that date there was upon the land a third-class railway carriage, which the vendor had bought from the Great Eastern Railway Company so as to afford a place where his workmen could have their dinner. There was no house upon the land. There was a partition inside the carriage, which extended up to the roof, and the plaintiff made an opening in the partition for the purpose of giving access from one part of the carriage to the other. He removed the seats from the carriage and put in a stove and a chimney, and he put bedding and furniture into the carriage. He lived in it with his wife and children. He also erected a shed upon the land with an earth closet in it. In January, 1908, the plaintiff was summoned before justices, upon the complaint of the defendant council, for having erected a building without having previously given notice of his intention to do so and without having deposited plans thereof as required by by-law 95 of the by-laws made by the defendant council, and he was fined 6*s*. On March 7, 1908, the defendants, through their clerk, served notice on the plaintiff, stating that he had committed an offence against by-law 10 (1) of the defendants' by-laws by having done certain work, namely, erected or caused to be erected a new building in contravention of the by-law, and requiring him to attend, either personally or by an authorized agent, before the defendant council on March 11 and to shew sufficient cause why such work should not be removed, altered, or pulled down; and the notice further stated that, if he failed to shew sufficient cause, the defendants would remove, alter, or

(1) By-laws 9—52, both inclusive, were headed "With respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for the purposes of health." By by-law 10, "Every person who shall erect a new building shall, except in such cases as are hereinafter specified, cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together." The excepted cases were new buildings intended for use as dwelling-houses not less than fifteen feet from an adjoining building, where timber framing properly put together, with the spaces between the timbers filled in completely with brickwork, might be used.

pull down such work. The plaintiff attended before the council, and in the opinion of the council failed to shew sufficient cause why the work should not be removed, altered, or pulled down, and accordingly on March 23 the clerk of the defendant council, acting in pursuance of a resolution of the council, gave the plaintiff notice that at the expiration of seven days the council would, unless the work was sooner pulled down, proceed to pull down such work. After the expiration of the notice the defendants by their workmen entered upon the land and completely pulled down the carriage and took the materials away to their yard. The plaintiff thereupon brought an action in the county court at Southend, claiming damages from the defendants for trespass in entering upon his land and pulling down the carriage, and for conversion of the materials in removing them to and detaining them at the defendants' yard. The county court judge, who tried the action with a jury, held upon the claim for trespass that the defendants were justified in pulling down the carriage, and he directed judgment to be entered for them upon that claim; and upon the claim for conversion he left the case to the jury, who found for the plaintiff for 5*l.* damages. The defendants having paid 5*l.* 10*s.* into Court, the judge entered judgment for the defendants. (1)

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157, gives power to an urban authority to make by-laws "(2.) with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires and for purposes of health," and to provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the power of such authority (subject to the provisions of the Act) to remove, alter, or pull down any work begun or done in contravention of such by-laws.

Sect. 159: "For the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

By-law 102 of the by-laws made by the defendant council: "If any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk to the council and shall be

C. A. 1909

HANRAHAN v. LEIGH-ON-SEA URBAN COUNCIL.

The Divisional Court affirmed the decision of the county court judge.

F. R. Y. Radcliffe, K.C., and *Thornton Lawes*, for the plaintiff. The defendants were not entitled to pull down the whole structure; all that they were entitled to do was to remove, alter, or pull down the work by which it was converted into a dwelling-house. Sect. 157 of the Public Health Act, 1875, empowers an urban authority to provide for the observance of their by-laws by enacting therein such provisions as they think necessary as to the power of the authority to remove, alter, or pull down any work begun or done in contravention of the by-laws. The defendants' 102nd by-law accordingly provides that, if any work to which any of the by-laws relating to new buildings may apply be begun or done in contravention of any such by-law, the council may, after taking the steps specified in the by-law, remove, alter, or pull down such work. So far it is clear that the only power given is to pull down the work done in contravention of the by-laws; and, if the matter stood there, the urban authority could only remove or alter so much of the structure as was added or altered in order to convert the original structure into a dwelling-house. It is argued, however, for the defendants that s. 159 gives them power in such a case as this to pull down and remove the whole building, including those parts of it which existed before it was converted into a dwelling-house. It is contended that such is not the effect of s. 159. The object of that section was merely to enact that, although a building had existed before the by-laws were passed, yet, if it was subsequently converted into a dwelling-house, it should be subject to the provisions of the by-laws as to new buildings, such as, for instance, provisions for the deposit of plans, or for securing structural stability or the preservation of health. The section

duly served upon or delivered to such person . . . . shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorized in that behalf before the council and to shew sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause why such work shall not be removed, altered, or pulled down, the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."

does not say that the old building so converted into a dwelling-house shall be considered an altogether new building for all purposes, but that the conversion, i.e., the process of converting, or in other words the work done in that process, shall be considered the erection of a new building. To interpret the section as the Divisional Court interpreted it would be to give the urban authority most unreasonably sweeping powers and would lead to extraordinary results. It would follow that, however large a building was, an attempt to alter it so as to make it available to the very least extent for a dwelling might enable the urban authority to pull the whole down. For example, if the owner of any extensive outbuildings in connection with a mansion, such as a large range of stables, was minded to add to them a single bedroom for a groom, the authority, if, upon this addition, the building did not comply with their by-laws, could, as soon as he had done anything by way of commencing the work, however little, remove and pull down the whole building; or, if it were proposed to turn a large house into separate flats, as soon as a single brick had been laid for the purpose of carrying out the scheme, the authority could, if there were any failure to comply with the by-laws, say that this was beginning to erect a new building, and pull the whole building down as being work begun or done in contravention of the by-laws. All that is necessary to secure the objects contemplated by the Public Health Act, 1875, is that the urban authority should have power to remove or alter the work by which the building was converted into a dwelling-house. It is not disputed that the defendants might in this case have filled up the opening in the partition, taken away the stove and chimney, and removed the shed outside used for an earth closet, and so restored the building to its original state; but it is contended that it is giving too wide a meaning to the language of s. 159 to construe it as entitling the defendants to pull down and remove the whole structure. [They cited *Hill* v. *East and West India Dock Co.* (1)]

J. R. Atkin, *K.C.*, and *C. Herbert Smith*, for the defendants, were not called upon to argue.

(1) (1884) 9 App. Cas. 448, at p. 464.

C. A. 1909

HANRAHAN v. LEIGH-ON-SEA URBAN COUNCIL.

LORD ALVERSTONE C.J. I might in this case content myself with saying that I am unable to see any ground for questioning the correctness of the judgment of the Divisional Court, and that I had come to the same conclusion for the same reasons; but, out of respect to the argument which has been addressed to us, I will make a few observations. In the first place I must decline to assume that the construction put upon the Act by the Divisional Court involves all the extraordinary consequences suggested by the plaintiff's counsel in reference to hypothetical cases put by him. We have to apply the provisions of the Act and by-laws to the particular facts of this case, which are as follows. An old railway carriage belonging to the plaintiff, which had previously been utilized as a shelter for workmen, was, by making an opening in a partition inside it, and putting in a stove and chimney, and by erecting a shed outside for the purposes of an earth closet, turned into a house in which the plaintiff and his family could live. It is not denied that this gave the local authority jurisdiction to take some action under the latter part of their 102nd by-law. The question is how far that jurisdiction extended. By s. 157 of the Public Health Act, 1875, it is provided that every urban authority may make by-laws "with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires and for purposes of health," and may "provide for the observance of such by-laws by enacting therein such provisions as they think necessary . . . . as to the power of such authority (subject to the provisions of this Act) to remove, alter, or pull down any work begun or done in contravention of such by-laws." In other words, the by-laws may provide that, where a new building is begun to be built, or is built, which is not in conformity with the by-laws, the local authority may pull that building down. Sect. 158 merely supplements s. 157 by providing for the deposit of plans, and that, where work is begun after notice of disapproval by the local authority, and is not in conformity with any of the by-laws, the authority may cause so much of it as has been executed to be pulled down or removed. Sect. 159 provides that "for the purposes of this Act . . . . the conversion into a

dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building." In this case it is not denied that there was a conversion of a building into a dwelling-house. When that has been effected, what is to be considered to be a "new building" under the section? It was argued that it was in this case the making of the opening in the partition, the putting up of the stove and the earth closet, and doing the other things necessary to fit the railway carriage for a dwelling, and that all the local authority had power to do was to remove or alter those things. Assuming that in some cases the local authority might exercise their jurisdiction in that way, if so minded, I am of opinion that their powers go further than is suggested. It is the new building which is aimed at by the provisions of the section; and in my opinion it makes no difference that in this case parts of a structure already standing were utilized for the purpose of forming the new building. The enactment provides that the conversion of an old structure into a dwelling-house shall for the purposes of the by-laws be considered to be the erection of a new building. It is suggested that all the local authority had power to do was to fill up the opening in the partition, and remove the shed outside, and so forth, and that they exceeded their jurisdiction in pulling down the whole structure. In my opinion that is putting too narrow a construction on the statute and the by-laws, as applied to the facts of this case. I must again say in conclusion that I decline to assume that our judgment involves all the consequences which have been suggested by the plaintiff's counsel, or that it would cover a case in which a local authority had done anything which could not reasonably be said to be removing, altering, or pulling down a new building within the meaning of s. 159. For these reasons I think this appeal fails and must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. Sect. 157 of the Public Health Act, 1875, empowers an urban authority to make by-laws with respect to the structure of new buildings, and

C. A. 1909

HANRAHAN v. LEIGH-ON-SEA URBAN COUNCIL.

Fletcher Moulton L.J.

to provide for the observance of those by-laws by enacting therein such provisions as they think necessary to enable them to remove, alter, or pull down any work begun or done in contravention of the by-laws. The by-laws made by the defendants in this case appear to me to carry out the intentions of the section and to be intra vires. That being so, the question arises whether in this case there has been a contravention of the by-laws, and, if so, what is the effect of the statute as regards the consequences of it. That there has been a contravention of the by-laws is not denied. It is admitted that under s. 159 the conversion of this railway carriage into a dwelling must be regarded as the erection of a new building, and that this building was not in conformity with the tenth by-law. Under those circumstances s. 157 and the by-laws made under it empower the local authority "to remove, alter, or pull down . . . . work . . . . done in contravention of such by-laws." That work appears to me in this case to be the erection of the new building as defined by s. 159. I think that the notice served on the plaintiff by the defendants rightly stated that he had contravened by-law 10 by erecting a new building which did not comply with its provisions; and, on that charge being proved, they were entitled to remove and pull down the said building so erected, that is to say, the totality, including the part which existed before, and which had been made use of for the purpose of forming the new building. I think the effect of the sections is not to limit the power of the local authority to restoring the structure to its original condition, but to give them all the powers they would have in the case of a wholly new building, which in the eye of the law is what this structure is.

FARWELL L.J. concurred.

Appeal dismissed.

Solicitor for plaintiff: *C. T. Wilkinson.*
Solicitors for defendants: *Lees & Co.*

E. L.

KERSHAW *v.* BROOKS.

1909
Feb. 8.

London—Buildings—Persons altering Drains—By-laws—Liability of Agents carrying out Work.

By-laws of the London County Council provided that "Any person who shall construct or reconstruct any pipe communicating with sewers" in connection with a building "shall cause every pipe in such building for carrying off waste water to a sewer to discharge in the open air over a properly trapped gully," and that "Every person who shall make any addition to or alter any pipes communicating with a sewer" shall cause a deposit to be made with the sanitary authority of the plans and particulars of the proposed addition or alteration.

A plumber was employed by the owner of a house to execute certain work in the house involving the alteration and reconstruction of certain pipes communicating with the sewer. In carrying out the work the plumber caused a waste pipe from a sink to discharge otherwise than in the open air over a properly trapped gully. Whether he did so by the orders of the owner did not appear. He also neglected to deposit plans of the proposed alteration:—

Held, that the mere fact that he did the work did not constitute him a person reconstructing or altering the pipes within the meaning of the by-laws so as to render him liable to penalties for their breach.

Case stated by a metropolitan police magistrate.

The respondent was summoned on November 13, 1908, to answer two informations laid by the appellant as sanitary inspector of the borough of Hampstead.

The first charged that he at No. 61, Alexandra Road did cause a waste pipe in connection with a sink to discharge into the hopper head of a rainwater pipe instead of causing the same to discharge in the open air over a properly trapped gully above the level of the water in the trap or over a channel leading to such a gully, contrary to the by-laws of the London County Council. In pursuance of the powers conferred by s. 202 of the Metropolis Management Act, 1855, the London County Council made certain by-laws, which were duly confirmed on November 6, 1900. By-law 10 of the said by-laws provided as follows: "A person who shall erect a new building . . . . shall cause every pipe in such building for carrying off waste water to a sewer to be taken through an external wall of such building and to

1909

KERSHAW v. BROOKS.

discharge in the open air over a properly trapped gully or into such a gully above the level of the water in the trap thereof or over a channel leading to such a gully." And by by-law 21, "These by-laws shall so far as is practicable apply to any person who shall construct or reconstruct any pipe drain or other means of communicating with sewers or any trap or apparatus connected therewith so far as he shall effect any such works in any building erected before the confirmation of these by-laws as if the same were being constructed in a building newly erected."

The respondent was a plumber and was employed by one Kellow, the owner of the house, who was a builder, to execute certain necessary sanitary works in connection with the conversion of the house into two flats. The works included, inter alia, the provision and fixing of a new bath and lavatory basins with traps and waste pipe in the bath-room and a new sink trap and waste pipe in the kitchen. The works, which were in fact done by the respondent's son, included the works complained of. The house in question, 61, Alexandra Road, was erected before November 6, 1900.

The second information charged that the respondent in connection with the above-mentioned works unlawfully made additions to or altered certain pipes communicating with the sewer without having caused a deposit to be made of the plans of the proposed additions or alteration in breach of certain by-laws made under s. 202 of the Metropolis Management Act, 1855, as amended by 62 & 63 Vict. c. 15, and approved by the Local Government Board on August 20, 1903. By by-law 1, par. 1, of the said by-laws, "Every person who in the provision of a drainage system as a whole is about to construct the pipes drains or other means of communication with a sewer or the traps and apparatus connected therewith shall deposit in duplicate with the sanitary authority of the district at their office such plans sections and particulars of the proposed construction as may be necessary for the purpose of enabling such authority to ascertain whether such construction is in accordance with the statutory provisions relative thereto and with the by-laws made under s. 202 of the Metropolis Management Act, 1855."

1909

KERSHAW v. BROOKS.

By by-law 2, "Every person who shall make any addition to, partially construct, entirely or partially reconstruct, or alter any pipes drains or other means of communicating with a sewer or the traps and apparatus connected therewith shall be deemed to have satisfied the foregoing by-law No. 1 if he shall cause a deposit to be made (in the manner therein provided) of only such plans sections and particulars of the proposed addition, partial construction, entire or partial reconstruction, or alteration as may be necessary for the purpose of enabling such authority to ascertain, &c."

The magistrate was of opinion that as the respondent did the work on the order of and for the owner of the house the informations should have been against the owner, who ordered the work to be done, and not against the respondent. He accordingly dismissed the informations subject to a case for the opinion of the Court.

Courthope-Munroe and *S. G. Turner*, for the appellant. The respondent was a person who reconstructed and altered the pipes within the meaning of the by-laws. The "person" therein specified is the contractor who does the work. If the owner of the house had been a person who knew nothing about building it would hardly have been disputed that the professional agent and not the lay principal would have been the person to deposit the plans. It is a mere accident that he happened to be a builder. That fact cannot relieve the agent of his obligation to comply with the by-laws, though it may afford a reason for holding that both the agent and the principal are liable.

The respondent, in person, was not called upon.

LORD ALVERSTONE C.J. In this case the respondent was summoned on two different charges. The first was for having caused a waste pipe in connection with a sink to discharge into the hopper head of a rainwater pipe in breach of by-law 10 of certain by-laws made in 1900 by the London County Council under s. 202 of the Metropolis Management Act, 1855. By-law 10 provides that "A person who shall erect a new building . . . . shall cause every pipe in such building for carrying off waste

1909.

KERSHAW v. BROOKS.

Lord Alverstone C.J.

water to a sewer . . . . to discharge in the open air over a properly trapped gully or into such a gully above the level of the water in the trap thereof or over a channel leading to such a gully." And by by-law 21, "These by-laws shall so far as is practicable apply to any person who shall construct or reconstruct any pipe drain or other means of communicating with sewers . . . . so far as he shall effect any such works in any building erected before the confirmation of these by-laws as if the same were being constructed in a building newly erected." The other summons was for not depositing plans in accordance with certain by-laws of the county council made in 1903, which in substance provide that "Every person who shall make any addition to, partially construct, entirely or partially reconstruct, or alter any pipes drains or other means of communicating with a sewer" shall cause a deposit to be made with the sanitary authority of plans of the proposed addition, alteration, or reconstruction, as the case may be. All that we know with regard to these two charges is that the person summoned did the work. The circumstances under which he did the work are not stated, nor are any facts stated upon which we could draw the conclusion that he had put himself in the position of the person ordering the work. Therefore in order to overrule the decision of the magistrate we must hold that the mere fact that he did the work brings him within the words "any person who shall construct or reconstruct any pipe or drain" in one case, and within the words "person who shall make any addition to . . . . any pipes drains," &c., in the other; and that I do not think we are justified in doing. I have no doubt that by-laws may be made imposing upon builders, plumbers, or others who construct or alter on behalf of other persons drains or pipes communicating with sewers the obligation of complying with those by-laws. But if it is intended to impose such an obligation upon mere agents who are executing the work for others, the by-laws should be framed in such a manner as to make it reasonably clear that that was the intention. Upon the case before us there is nothing to shew that the respondent did more than carry out the orders given to him by the building owner, and it seems to me that the magistrate was right in taking the view that a person occupying that position did not

come within the terms of the by-laws in question. The appeal must be dismissed.

1909

KERSHAW v. BROOKS.

WALTON and JELF JJ. concurred.

Appeal dismissed.

Solicitor for appellant: *A. P. Johnson.*

J. F. C.

THE KING *v.* PLOWDEN.

1909

March 22.

Motor Car — Exceeding Speed Limit — Parks Regulations — Indorsement of Licence—Motor Car Act, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

A Court before whom a person is convicted of a third offence of driving a motor car in a Royal park at a speed exceeding the limit prescribed by the parks regulations has power to indorse the driver's licence under s. 4 of the Motor Car Act, 1903, notwithstanding that the parks regulations prescribing the speed limit were not made until after the Motor Car Act, 1903, had come into force.

RULE for a certiorari to quash a conviction by a metropolitan police magistrate under s. 4, sub-s. 2, of the Motor Car Act, 1903.

The applicant, Michael Braithwaite, was on May 12, 1908, convicted at the Marylebone police court of having on May 3, 1908, driven in Regent's Park a motor car at a greater speed than ten miles an hour, contrary to the regulations made by the Commissioners of His Majesty's Works and Public Buildings on April 28, 1904. (1) It was then proved before the magistrate that

(1) By s. 4 of the Parks Regulation Act, 1872 (35 & 36 Vict. c. 15), "If any person does any act in contravention of any regulation contained in the First Schedule annexed hereto he shall on conviction before a Court of summary jurisdiction be liable to a penalty not exceeding 5*l.*"

By regulation 2 of the First Schedule to that Act it was provided that "no person shall drive . . . . in a park any vehicle . . . . except in accordance with the rules of the park."

And on April 28, 1904, regulations were issued by the Commissioners of His Majesty's Works and Public Buildings relating to motor cars and cycles in the Royal parks, by regulation 2 of which "No . . . . carriage or car propelled or drawn by mechanical means is allowed to proceed at a greater pace than ten miles an hour."

1909

REX v. PLOWDEN.

the applicant had been twice previously convicted of having exceeded the ten-mile speed limit in Richmond Park, and the magistrate thereupon directed that he should produce his licence for purposes of indorsement under s. 4 of the Motor Car Act, 1903. The applicant, having failed to produce it, was summoned and convicted therefor under s. 4, sub-s. 2. (1) He then obtained a rule for a certiorari to quash the latter conviction upon the ground that the Motor Car Act, 1903, did not apply to offences created after the passing of the Act, and that consequently the magistrate had no power to indorse his licence or call upon him to produce it for indorsement.

Lowenthal and *Travers Humphreys* shewed cause. The offence of which the applicant was convicted on May 12, 1908, namely, that of exceeding the speed limit fixed by the parks regulations, was an "offence in connection with the driving of a motor car" within the meaning of s. 4, sub-s. 1, of the Act of 1903. It will be contended on the other side that those words must be understood as limited to offences under the existing law at the date when the Motor Car Act came into force, namely, January 1, 1904, and do not include offences under the parks regulations, which were not issued till April 28, 1904. The words "any offence" are perfectly general and are subject only to the exception specified in the section, that of a first or second offence of exceeding a speed limit. The mention of that exception excludes the idea that the words were intended to be subject to any other exception. The magistrate therefore had jurisdiction to indorse the licence.

(1) By s. 4, sub-s. 1, of the Motor Car Act, 1903, "Any Court before whom a person is convicted of an offence under this Act, or of any offence in connection with the driving of a motor car, other than a first or second offence consisting solely of exceeding any limit of speed fixed under this Act—

. . . . .

"(c) If the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the Court made under this section to be indorsed upon any licence held by him."

Sub-s. 2: "Any person so convicted, if he holds any licence under this Act, shall produce the licence within a reasonable time for the purposes of indorsement, and if he fails to do so shall be guilty of an offence under this Act."

1909

REX v. PLOWDEN.

Tindal Atkinson, K.C., and *Moresby White*, in support of the rule. It is a principle of construction of penal statutes that they are prima facie to be regarded as not applying to offences created after the statutes had come into operation. In *Reg.* v. *Smith* (1) it was held that where a partner stole goods which were the property of the partnership a person who received the goods knowing them to have been so stolen could not be convicted of receiving under s. 91 of the Larceny Act, 1861, inasmuch as the Act which made theft by a partner a felony was not passed at the time of the coming into force of the Larceny Act, 1861, one of the grounds given by the Court for so holding being "the rule . . . . against extending penal enactments by construction." Similarly in the subsequent case of *Reg.* v. *Streeter* (2) it was held that a person who received from a wife goods which she had stolen from her husband could not be convicted of receiving, as the Married Women's Property Act, 1882, which first made it a criminal offence for a wife to steal her husband's property, was not in existence at the date of the passing of the Larceny Act, 1861. Where the Legislature intend a statute to apply to offences to be thereafter created as well as to existing offences they say so in terms, as for instance in s. 16 of the Summary Jurisdiction Act, 1879, where power is given to the Court to discharge without punishment a person convicted of "an offence punishable on summary conviction under this Act or under any other Act, whether past or future." As the parks regulations were not issued till April 28, 1904, four months after the Motor Car Act came into operation, the driving of a motor car in breach of those regulations cannot be regarded as an "offence in connection with the driving of a motor car" within the meaning of s. 4, sub-s. 1. The magistrate therefore had no jurisdiction to order the applicant to produce his licence for indorsement.

LORD ALVERSTONE C.J. In this case the applicant was convicted for the third time of driving a motor car in one of the Royal parks at a speed exceeding the limit fixed by the parks regulations, and the question is whether under those circumstances he could be called upon to produce his licence for

(1) (1870) L. R. 1 C. C. R. 266. (2) [1900] 2 Q. B. 601.

1909

REX v. PLOWDEN.

Lord Alverstone C.J.

indorsement. That depends upon whether the offence of which he was so convicted comes within s. 4 of the Motor Car Act, 1903. That section provides that "Any Court before whom a person is convicted . . . . of any offence in connection with the driving of a motor car, other than a first or second offence consisting solely of exceeding any limit of speed fixed under this Act . . . . (*c*) if the person convicted holds any licence under this Act, shall cause particulars of the conviction and of any order of the Court made under this section to be indorsed upon any licence held by him." That language taken by itself is prima facie wide enough to cover the case. It is clear that the words "offence in connection with the driving of a motor car" include the offence of exceeding a speed limit, unless it happens to be a first or second offence. But it was said that the section nevertheless does not apply to the present case because the limit of speed which the applicant exceeded was not fixed by or under the Act. The answer is that the language of the section is perfectly general. It is true that the framers of the Act failed to observe that s. 9, which enabled the Local Government Board to prohibit the driving of a motor car within certain special areas at a speed exceeding ten miles an hour, did not cover the whole ground, for it did not contain any words dealing with a speed limit to be fixed by any authority other than the Local Government Board. But that omission cannot affect the construction to be put upon the wide terms of s. 4. I adopt the language of A. T. Lawrence J. in the case of *Rex* v. *Marsham* (1), where he says: "I think that the words 'fixed under this Act' were supposed at the time the Act of 1903 was passed to cover all cases of speed limits, and that it was not foreseen at that time that there might be, under some other statutes then in existence, limits of speed fixed in the future, and therefore I think that the true construction of s. 4 is to read it as applicable not merely to speed limits fixed under the Act of 1903, but also to other speed limits—all speed limits fixed lawfully and by due authority." If that is the right view as to the meaning of s. 4 it is conclusive of this case. Mr. Atkinson has contended that a penal statute cannot in the absence of a clearly expressed intention to that effect be read as applying to offences created

(1) [1907] 2 K. B. 638.

subsequently to the passing of the Act. But where there was at the time of the passing of the Act an existing authority with power to make regulations, the mere fact that that power was not exercised until after the Act came into force is not a sufficient ground for holding that it was not intended to apply to breaches of the regulations when made. I am of opinion that the rule should be discharged.

DARLING J. I am of the same opinion. The Motor Car Act in terms deals with offences created under the Act itself and also with offences against the regulations of the Local Government Board. There are in fact other regulations made, neither under the Act nor by the Local Government Board, but under the Parks Regulation Act, 1872, relating to traffic in the parks. At the time the Motor Car Act was passed those latter regulations were not in existence, and Mr. Atkinson has contended that for that reason the Act cannot be regarded as applying to breaches of those regulations. But that point might with equal force have been urged in *Rex* v. *Marsham* (1), and if it had been successful it would have been a complete answer to the charge in that case and would have rendered unnecessary the argument that was in fact addressed to the Court. But apparently the point was not thought worth taking. It may have been just mentioned, but it certainly was not pressed. Indeed, if we are to look at the date alone, Mr. Atkinson's argument would equally apply to breaches of the regulations made by the Local Government Board, for they were not made till after the passing of the Act. But the power of the Local Government Board to make those regulations was in existence at that date, and so equally was the power to make the parks regulations in existence then. It has been contended that if we uphold the magistrate's decision in this case we shall be offending against the rule referred to by Bovill C.J. in *Reg.* v. *Smith* (2) "against extending penal statutes by construction." But in my opinion that is not so. If we do not support the decision we must hold that none of the provisions of the Motor Car Act apply to persons driving motor cars in the parks, and it could hardly be seriously contended that Parliament

(1) [1907] 2 K. B. 638. (2) L. R. 1 C. C. R. 266.

1909

REX v. PLOWDEN.

Darling J.

intended that result. It may be that Parliament when passing the Act forgot that they had not dealt with the parks, and I cannot think that in the circumstances our holding that the Act applies to breaches of the parks regulations is any real extension of the statute.

JELF J. I agree. The instances given by Mr. Atkinson of an extension of penal statutes by construction are instances of a fundamental change in the criminal law, but nothing of that kind is involved in what we are doing here.

Rule discharged.

Solicitors for applicant: *Firth & Co.*

Solicitor for respondent: *Solicitor to the Treasury.*

J. F. C.

C. A.

1909

March 23, 24.

[IN THE COURT OF APPEAL.]

MOSS *v.* GREAT EASTERN RAILWAY COMPANY.

Employer and Workman—Compensation—Decision of County Court Judge on Preliminary Question—Appeal to Court of Appeal—Jurisdiction—Certified Scheme—Rules of Management—Rules not certified—Scheme under Act of 1897—*Commencement of Act of* 1906—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 15; *Sched. II.* (4.)—*Workmen's Compensation Act*, 1897 (60 *&* 61 *Vict. c.* 37), *s.* 3.

Under clause 4 of Sched. II. to the Workmen's Compensation Act, 1906, an appeal now lies to the Court of Appeal from a decision by a county court judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, and not, as formerly, only after an award has been made.

A scheme of compensation certified by the Registrar of Friendly Societies under s. 3 of the Workmen's Compensation Act, 1897, cannot, unless recertified under the Act of 1906, apply to an accident happening after the commencement of the Act of 1906, though within the six months at the end of which the scheme is declared to be revoked by s. 15.

A scheme providing a fund for the compensation of the servants of a railway company provided that the fund should be managed by a committee thereby constituted according to rules (not inconsistent with the terms of this scheme) to be framed from time to time by the committee. Rules had been framed containing a contract by the workmen that the

Act should not apply, and other provisions held by the Court not to be in accordance with the scheme. The scheme was certified, but the rules were not:—

Held, that there was no properly certified scheme excluding the Act.

THIS was an appeal from a decision of the judge of the Ipswich County Court.

The plaintiff, a workman in the employment of the Great Eastern Railway Company, met with an accident in November, 1907; he received an allowance from that date until January 6, 1908, from the "Great Eastern Railway Accident Fund," a scheme which had been certified by the registrar under s. 3 of the Workmen's Compensation Act, 1897. On January 6, 1908, he "declared off" the fund and went back to work. On January 13 he was discharged from the company's service, and afterwards he commenced these proceedings to obtain compensation under the Workmen's Compensation Act, 1906. The scheme provided that the fund should be managed by a committee consisting of the chairman and four other officials of the company and four servants of the company members of the fund "and in accordance with rules (not inconsistent with the terms of this scheme) to be from time to time framed by the committee." The scheme then provided that any servant of the company should be entitled to become a member of the fund on making application; that it should not be compulsory upon any one to join the fund, but any person becoming a member should remain so long as he was employed by the company and the scheme continued in force. It then fixed the amount of contributions by the members and the company and the allowances to be paid in case of death or injury; and provided that the company should guarantee the payment of all allowances if the fund was insufficient, and that at the end of five years and a half from the date at which the fund came into operation any balance to the credit of the fund should be divided among the members in proportion to their months of membership.

The registrar certified this scheme for five years. Rules were framed by the committee and acted upon. It was stated that the rules had been submitted to the registrar and approved, but

C. A. 1909

MOSS v. GREAT EASTERN RAILWAY.

they were not certified. So far as important the rules are set out below. (1)

(1) Rule 4. "The fund is established for the purpose of securing to the members or to their representatives or dependants allowances in lieu of all payments to which they would or might by law otherwise become entitled by virtue of the provisions of the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or otherwise in respect of personal injury arising out of and in the course of their employment in the service. And every person who becomes a member in consideration of the allowances provided under the scheme and these rules hereby releases and forgoes on behalf of himself and his representatives and dependants all claims upon the company under the said Acts or otherwise in respect of any such personal injury as aforesaid."

Rule 7. "The fund shall be managed by a committee to be called the managing committee composed as mentioned in the scheme."

Rule 15. "Before payment of any allowance the managing committee shall be entitled to call for and be furnished with such information and particulars as in their discretion they may think necessary to establish the validity of the claim, and the managing committee are hereby authorized to pay any allowance to such person or persons and in such shares and proportions as in their discretion and having regard to the terms and object of the scheme and the circumstances of each particular case they may think fit."

Rule 19. "The managing committee shall have full power to decide either generally or with reference to any particular case whether any and what circumstances constitute an injury within the meaning of that term as used in the scheme."

Rule 20 empowered the committee to wholly or partially withhold any allowance from a member who had sustained an injury attributable to serious and wilful misconduct on his part.

Rule 21 provided that a member who had given notice of an injury should if and so often as might be required by the committee submit himself for examination by a duly qualified medical practitioner, provided and paid by the committee, or the company, and gave the committee power to withhold an allowance in case of refusal.

Rule 22. "If any question, other than such as the managing committee are hereby expressly empowered to decide, shall arise with respect to the scheme or the right to alter the amount or duration of an allowance thereunder, or with respect to the construction or meaning of the scheme or of these rules or any variation of or alteration thereof, the question, if not settled by agreement, shall be settled by the managing committee, whose decision shall be final."

Rule 27 provided that on the expiration of the period certified by the registrar, or upon the earlier revocation of the certificate, any balance standing to the credit of the fund after payment of all allowances and other payments due or to become due under the scheme or these rules should be distributed in the manner provided in the scheme.

The form of application for

Objection was taken in the county court on behalf of the company that the jurisdiction of the Court was ousted by the scheme for compensation.

The county court judge overruled this objection, but having regard to the question of law, and with a view to save expense to the parties, he merely gave a decision that Moss was entitled to claim compensation under the Act of 1906, and he adjourned the rest of the case pending an appeal on this point.

The railway company appealed.

C. A. Russell, K.C., and *Henlé*, for the respondent, took a preliminary objection that no appeal to the Court of Appeal could be brought until the county court judge had made an award, that if an appeal of any kind was permissible it could not be brought to the Court of Appeal, and that there were other recognized methods of dealing with a question like this of jurisdiction.

E. E. Wild (*Montague Shearman, K.C.*, with him), for the appellants. Sched. II. (4.) of the Workmen's Compensation Act, 1906, gives a right of appeal to this Court not only when the county court judge "settles the matter under this Act," i.e., makes an award, but "where he gives any decision or makes any order under this Act." These words, which do not occur in the corresponding section of the Act of 1897, i.e., Sched. II. (4.), are new and exactly apply to a case like the present.

Cozens-Hardy M.R. I am of opinion that we have jurisdiction to entertain this appeal. I think that the new words added to Sched. II. (4.) to the Workmen's Compensation Act, 1906, give an entirely different colour to that clause compared with the corresponding clause of the Act of 1897, and enable us to hear this appeal. We cannot disregard the new words "any decision." In the present case there was an important decision on this question as to whether the applicant was bound by the provisions of a certificated scheme. That question was argued, and the

---

membership stated that the applicant desired to become a member of the fund upon the terms of the scheme certified by the registrar and the rules framed thereunder.

C. A. 1909

MOSS v. GREAT EASTERN RAILWAY.

county court judge expressly held that it would be much better that he should express his view on that point first; he did so, and then adjourned the rest of the case until after this preliminary question had been brought before the Court of Appeal. That clearly was a decision given by him which it seems to me is by the express language of clause 4 now open to appeal.

FLETCHER MOULTON L.J. I am of the same opinion, but I come to this conclusion with some trepidation, because I feel that we are reading clause 4 with a breadth which may lead to a great increase of our power of hearing appeals; but I agree with the Master of the Rolls that the new words added to clause 4 are words from which we cannot escape, and I am of opinion that they ought not to have a narrower scope, and therefore that, this having been a decision of the county court judge, there is a right of appeal to this Court.

FARWELL L.J. I am of the same opinion. No doubt the words "where he himself settles the matter under this Act" mean when the county court judge makes an award. If that is so, the new clause 4 not only contains those words, but adds the further words "or when he gives any decision or makes any order under this Act"; and it seems to me that by those words the Legislature intended to extend the jurisdiction, and that all appeals should come here, and therefore that an appeal lies to us from the present decision. This course is obviously much more convenient than that resort should be had to a writ of prohibition or some other proceedings.

W. C. D.

The case was then argued upon the merits, wholly upon the construction of the Workmen's Compensation Act, 1906. That Act came into operation on July 1, 1907. Sect. 3 of this Act gave the Registrar of Friendly Societies power to certify schemes under which employers and workmen could contract themselves out of the Act similar to but not the same as the power under the Act of 1897. The Act of 1906, s. 3, contained wider provisions for protection of the workmen than the similar section

of the Act of 1897, but the main question turned upon the construction of ss. 15 and 16 of the Act. (1)

Montague Shearman, K.C., and *E. E. Wild*, for the appellants. The fund in this case was a scheme which was in force when the Act of 1906 came into operation. It had been properly certified under the Act of 1897, and by s. 3, sub-s. 1, of that Act the certificate makes the scheme good until revocation. The time at which the scheme is to be revoked is fixed by s. 15 at six months after the commencement of the Act, i.e., January 1, 1908. The Act commences on July 1, but gives six months' grace to the old schemes. There would be no meaning in the delay if the scheme was void immediately on the passing of the Act. In *Wallace* v. *R. & W. Hawthorne Leslie, Ld.* (2), a Scotch case, all the judges considered that a scheme certified under the Act of 1897 continued in force until December 31, 1908, so far as any one who had signed the scheme before the commencement of the Act of 1906 was concerned. They held that in the case before them the contract was not good because the workman had signed the scheme after the commencement of the Act of 1906.

C. A. Russell, K.C., and *Henlé*, for the respondent. At the time the accident happened the Act of 1906 was in force. It is clear that the workman had then no rights under the Act

(1) Sect. 15. "(2.) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if recertified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act.

"(3.) The Registrar shall recertify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes.

"(4.) If any such scheme has not been so recertified before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked."

Sect. 16. "(1.) This Act shall come into operation on the first day of July nineteen hundred and seven, but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act.

"(2.) The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases."

(2) (1908) 45 Sc. L. R. 547.

C. A. 1909

MOSS v. GREAT EASTERN RAILWAY.

of 1897, but only those under the Act of 1906. He cannot be compelled to take in place of his new and enlarged rights the compensation which he had agreed to take for his rights under the Act of 1897. Even if rule 4 is binding, there is no contract as to the rights under the Act of 1906. If it is to be read as a contract to give up all future rights, whatever they may be, it is not in accordance with the scheme or the Act of 1897 and is bad. If it is not to be so read it does not help the appellants' case. Another and a fatal objection to the appellants' case is that the registrar certified the scheme, but not the rules. The rules are not consistent with the scheme, and the only contract on which the respondents can rely is in the rules. [They also referred to *Haworth* v. *Andrew Knowles & Sons.* (1)] This application was made in January, 1908, when the scheme had certainly ceased to exist, for there was no recertification.

E. E. Wild, in reply. The six months given by s. 15, sub-s. 4, of the Act of 1906 is to prevent any hiatus. The company had six months in which to certify or establish a new scheme; meanwhile the status quo was maintained. As to the argument that the rules were not registered, the rules must not be inconsistent with the scheme; if they are they would be void; but rule 22 is not inconsistent. It does not bar all future rights. *Taylor* v. *Hamstead Colliery Co.* (2) is an authority that benefits accepted under a certified scheme are in substitution for all benefits to which the workman is entitled. The question of future rights does not arise, for the effect of the six months' grace was that a workman who had signed the scheme obtained no rights under the Act of 1906 until January 1, 1908.

COZENS-HARDY M.R. This appeal raises questions of undoubted importance, though to my mind not of very serious difficulty. I feel we have had every assistance that could be afforded to us by the counsel who have argued the case on both sides.

The facts necessary for me to state are extremely short. A scheme under the Act of 1897, which I shall have to call attention to in a moment, was certified by the registrar in December, 1903. A workman in February, 1906, signed a document, to which I

(1) (1903) 19 Times L. R. 658. (2) [1904] 1 K. B. 838.

shall have to call attention more particularly, but which for the present purpose I assume to be a contract with his employers, the railway company.

The Act of 1906 came into force in July, 1907. An accident happened to the workman in November, 1907, and the proceedings in this arbitration were started in October, 1908. The question of jurisdiction was raised, and the question was this: Aye or No, has the applicant deprived himself of his right to compensation under the Act of 1906, or, in other words, is he bound by a contract which the law permits him to enter into to accept something else in lieu of compensation to which he is entitled under the Act of 1906?

Now for that purpose it is necessary to consider both the Act of 1897 and the Act of 1906. By the Act of 1897, s. 3, the provision was made in these terms: "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." The scheme was certified by the registrar, as I have said, in December, 1903. That scheme provided, first, that the fund should be managed by a committee and in accordance with rules, not inconsistent with the terms of the scheme, to be framed from time to time by the committee, and then that every servant should be entitled to become a member of the fund upon application for the purpose; that it should not be compulsory upon him to join the fund; and that any person becoming a member should remain so as long as he was employed and the scheme continued in force. Provision is then made for financing the fund, so to speak, the fund being paid partly and largely by the railway

C. A. 1909

MOSS v. GREAT EASTERN RAILWAY.

Cozens-Hardy M.R.

company, and partly by contributions made by the men, and it is right that I should say that the railway company guaranteed, in fact, the solvency of the fund. That is all I need read of the scheme itself.

Certain rules were made which have never been certified by the registrar, and which can have no validity, operation, or effect, in so far as, or if, they are inconsistent with the terms of the scheme itself. Now the rules state this: Rule 4. [His Lordship read the rule.] What is the meaning of that rule in point of construction? Do those words "or otherwise" include compensation to which the workmen may be entitled under future legislation? If they do, it seems to me that the rule is plainly inconsistent with the provisions of the scheme, and one which it is scarcely conceivable that the registrar should have sanctioned or approved of. If they mean simply the compensation to which a workman might be entitled, not under the Employers' Liability Act, 1880, or under the Workmen's Compensation Act, 1897, but at common law, there is nothing in rule 4 which in any way assists the applicant in the present case, for reasons which I shall afterwards enlarge upon. Then the rules contained a number of matters, some of which I am bound to say seem to me to be clearly inconsistent with what ought to be the scheme of the Act. Rule 17, for instance, imposes upon the workman terms which are not found in the Act of 1897, and requests him to give notice within three days of the accident, and contains a provision that no claim will be allowed unless it has been reported within one month, although the committee have power under special circumstances to relax the rule. Nay, more, it is left to the committee to say whether an injury constitutes an injury within the meaning of that term of the scheme, and it enables the committee to decide a great number of things which may vary or infringe the statutory rights of the workman.

Amongst others, rule 22 provides: "If any question other than such as the managing committee are hereby expressly empowered to decide shall arise with respect to the scheme or the right to alter the amount or duration of an allowance thereunder or with respect to the construction or meaning of the scheme or of these rules or any variation or alteration thereof the question if not

settled by agreement shall be settled by the managing committee whose decision shall be final." Those rules, as I say, have never been certified; they are not part of the scheme; they have no validity at all in so far as they are inconsistent with the scheme.

The contract is in these terms, for I assume for the purpose of my argument that it is a contract made by the workman with the railway company, although there might be some colour for the contrary suggestion: "To the secretary. I desire to become a member of the above fund upon the terms of the scheme certified by the Registrar of Friendly Societies and the rules framed thereunder, and I authorize the deduction from my wages of one penny per week as my contribution to the said fund." That is the contract the workman had entered into, which from any point of view was a contract to accept the scheme and the rules, whether good or bad, in satisfaction of his rights to payment or compensation under the Employers' Liability Act, 1880, or the Workmen's Compensation Act, 1897, or at common law.

Then came the Act of 1906, which undoubtedly enlarged the rights of workmen to a very considerable extent, not merely by enlarging the class of workmen entitled to compensation at all, but enlarging the amount of compensation and the benefits to which members of the old class were entitled under the Act of 1897. In s. 3 of the Act of 1906 there is a provision similar to that in the Act of 1897. I had better read the material parts of it. "If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any

C. A. 1909

MOSS v. GREAT EASTERN RAILWAY.

Cozens-Hardy M.R.

of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act." It will be observed that the provisions for the protection of the workmen are wider under s. 3 of the Act of 1906 than they are under the corresponding section of 1897.

Then we come to s. 16, which I will read purposely before I read s. 15. Sect. 16 provides that the Act of 1906 shall come into operation on July 1, 1907, and shall not apply in any case where the accident happened before the commencement of the Act, and sub-s. 2 says the Act of 1897 is repealed, "but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases." Therefore it seems to me perfectly clear that the Act and the only Act which applies to the accident in the present case is the Act of 1906, and that the Act of 1897 is, so far as the present case is concerned, repealed and has no operation or effect.

Then it has been said there is something in s. 15 which entitles the railway company to say that although the scheme and rules, which I now assume to be free from objection, only provided an equivalent for rights to compensation under the Act of 1897, they are entitled to hold the workman bound to accept that scheme as equivalent to and as satisfaction of his rights under the subsequent Act of 1906, which gives him, the workman, a larger and greater right. It seems to me that is an impossible contention having regard to s. 15. I say nothing about sub-s. 1 of s. 15 for the simple reason that I do not profess to understand it. Sub-s. 2 says: "Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act"—and the present scheme is in that class—"shall, if recertified by the Registrar of Friendly Societies, have effect as if it were a scheme under this Act." Suffice it to say that this scheme has not been recertified by the registrar, and it could not have been recertified by him unless, amongst other things, he certified that the benefits given to the workmen were at least equivalent to those they were entitled to under the Act of 1906. Sub-s. 3 says in terms, "The

registrar shall recertify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes," and then sub-s. 4 is this: "If any such scheme has not been so recertified before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked." I am entirely unable to appreciate the argument which has been addressed to us that the effect of that sub-section on a contract entered into on February 2, 1906, by the workman to accept a scheme under the Act of 1897 is this, that the scheme is to continue in force for six months and to have an enlarged effect so as to make it apply to the Act of 1906 instead of the Act of 1897. I am entirely unable to accept that view. It seems to me that the rights of the applicant are, and are solely, under the Act of 1906. There is nothing whatever that has taken place to bar his right to claim compensation under and in accordance with the provisions of the Act of 1906, or to shew that this scheme, coupled with these rules, even if otherwise free from objection, could have any relevancy to the matter which is now before us.

In my opinion this appeal fails and must be dismissed with costs.

Fletcher Moulton L.J. I am of the same opinion. The learned county court judge has held that his jurisdiction was not ousted by the matters brought to his attention by the appellants. It seems to me he was right on many grounds. I agree entirely with all that the Master of the Rolls has said in his judgment, but to my mind the most fundamental answer to the argument of the appellants is as follows. I will assume that there is a contract between the workman and the company that the provisions of this little book shall be substituted for the provisions in favour of the workman at the time the contract was entered into—I say I assume it because I do not wish to decide it. I can see that there may be difficulties in holding that such is the case, because I am satisfied that the Legislature contemplated, though it may not have made it essential, a plain and simple contract between the two parties, the company and the workman, and you find no such plain

C. A. 1909

Moss v. Great Eastern Railway.

Fletcher Moulton L.J.

contract here that the provisions of the scheme should take the place of the other privileges that the workman has under the law. Assuming that, I find that the workman signed the scheme and the rules, and that the seal of the company was also put to the scheme and the rules. Therefore the contract was to substitute the scheme and the rules for the benefits to which the workman would otherwise be entitled. Now it is quite clear that both under the Act of 1897 and the Act of 1906 no such contract is of avail unless the scheme has been certified by the registrar. That does not mean such portion of the arrangement as the parties elect to call the scheme; it must be the whole scheme. I do not say that there may not be directory rules which are framed to decide the practical arrangements for application for compensation and such things which may be outside the scheme, but in all essentials the scheme, that is to say that which defines the benefits which the workman has accepted in lieu of those which he otherwise has by law, must have been certified.

Now I look at the rules and the scheme, and, for the reasons that the Master of the Rolls has pointed out, it is plain that the most essential parts of that scheme which is to be taken in substitution of the legal rights appear in the form of rules. The consequence is that the contract between the company and the workmen is not to take the benefits under any certified scheme, but under an uncertified scheme, instead of the rights to which they would otherwise be entitled. Therefore both for the Act of 1897 and, if it were possible to make it apply, for the Act of 1906 there is no certified scheme put forward; the only thing that has been certified is a portion of the alleged scheme. That being so, the whole case for ousting the jurisdiction appears to me to have disappeared.

For these reasons it appears to me that the learned county court judge is right.

Farwell L.J. I am of the same opinion. There appear to me to be two fatal answers to the railway company's contention. The first is, this accident arose after the Act of 1906 came into operation, and the remedy therefore is under that Act. A

scheme might be made under that Act which would be an answer, or the scheme under the Act of 1897 might have been recertified so as to become a scheme under that Act. Neither of those events has happened. There is nothing therefore to prevent a claim arising under the Act of 1906 from being decided under that Act by reason of the existence of any scheme at all. Further I think it is important to observe that the scheme is not even good under the Act of 1897. Sect. 3 provides that the employer may contract with any of the workmen that the provisions of the scheme shall be substituted for the provisions of the Act. I do not say that there may not be cases in which some rules might possibly be adopted as supplemental to the scheme. It seems to me it would be exceedingly unsafe. I think it is very much better that the scheme should be what the Act contemplates, a complete scheme certified by the registrar, and should not be left as a skeleton, to be filled in by any rules.

However that may be, in this particular case the scheme provides that the fund shall be managed in accordance with the rules. Now management is one thing; it is a perfectly intelligible and well known phrase—managing a fund or managing an estate. But surrender of rights in consideration of sharing in the benefit of that fund which is to be so managed is quite a different thing, and it is the rule and not the scheme which contains the contract upon which reliance is placed in this case. There is nothing to my mind which can be called the management of a fund in accordance with the rules in a provision which says that the workmen shall accept the allowances given to them out of that fund "in lieu of all payment to which they would or might by law otherwise become entitled by virtue of the provisions of the Employers' Liability Act, 1880, the Workmen's Compensation Act, 1897, or otherwise," and so on. That is not the management of the fund; that is surrender of the rights of the workmen in consideration of participating in the benefits of that fund to be so managed, and is a matter which certainly ought to be certified.

As has been pointed out by both the other members of the Court, the only contract entered into by the workmen and the company is a contract to abide by the terms of the scheme certified by the

C. A. 1909

Moss v. Great Eastern Railway.

registrar and the rules framed thereunder. This particular rule is not in accordance with the scheme; it never was certified. Consequently in my judgment there has been no certified scheme to comply with the Act of 1897. On both of these grounds I think the appeal fails.

Appeal dismissed.

Solicitors: *E. Moore; Field, Roscoe & Co., for Leighton and Pretty, Ipswich.*

J. R. B.

1909
Feb. 9, 15.

PEARL LIFE ASSURANCE COMPANY *v.* JOHNSON. THE SAME *v.* GREENHALGH.

Life Insurance—Policy—Proposal Basis of Contract—Effect of Absence of signed Proposal—Estoppel.

The plaintiff effected with an insurance company a policy of insurance under the seal of the company upon the life of her husband, therein called the assured. The policy was expressed to be issued in consideration of the plaintiff having signed a proposal, such proposal being the basis of the contract, and it being stipulated that if the proposal contained any untrue statement as to the state of health of the assured the policy should be void. Upon the death of the assured the plaintiff, who had duly paid the premiums, claimed the amount insured. The company resisted the claim on the ground that the proposal on which the policy had been issued contained misrepresentations as to the assured's health. At the hearing before justices of a complaint for non-payment of the sum insured the plaintiff satisfied the justices that a proposal produced by the company and purporting to be signed by her was not signed by her or with her authority, and she further stated that no proposal at all had been signed by her or with her authority:—

Held, that the company having issued the policy and received the premiums were estopped from contending that in consequence of the want of a proposal there was no contract; that the mere fact that the plaintiff, instead of confining her evidence to the disproof of the proposal put forward by the company, made the admission, irrelevant to her own case, that there had been no proposal at all did not prevent her from taking the benefit of that estoppel; and that the company were liable on the policy.

Two cases stated on appeal from the decisions of the stipendiary magistrate of Leeds and justices of Lancashire respectively upon complaints under s. 7 of the Collecting Societies and

Industrial Assurance Companies Act, 1896 (59 & 60 Vict. c. 26), for non-payment of money due under policies of life assurance.

1909

PEARL LIFE ASSURANCE COMPANY v. JOHNSON.

THE SAME v. GREENHALGH.

PEARL LIFE ASSURANCE COMPANY *v.* JOHNSON.

The complaint alleged that on August 5, 1907, the respondent Sarah Ann Johnson insured with the appellant company the life of William Johnson, her husband, for the sum of 13*l.* 16*s.*, and paid as premiums on the policy of assurance the sum of 3*d.* weekly from the date thereof up to October 11, 1908, the date on which her husband, the assured, died.

Upon the hearing of the complaint the following facts were proved or admitted:—

A proposal form dated July 26, 1907, was produced, purporting to be signed by the respondent, in which to the question "Is the proposed now or has he ever been afflicted with any mental or bodily disease or infirmity?" the answer was "No." In pursuance of the said proposal a policy was granted by the appellants, which provided "That in consideration of the person who is named and described in the first column of the schedule embodied herein"—Sarah Ann Johnson—"and who is hereinafter designated the proposer having signed and caused to be delivered to the Pearl Life Assurance Company Limited a proposal bearing date July 26, 1907, such proposal being the agreed basis of the contract between the company and the proposer and it being also stipulated that if any untrue averment be contained therein as respects age state of health or other circumstance all moneys paid on account of the assurance so made shall be forfeited to the company and this policy declared null and void," and in further consideration of the payment by the proposer of the stipulated premiums, the appellants would upon the death of William Johnson pay to the proposer the sum insured. There was also a proviso—"Provided always that this policy or instrument is granted upon the express condition that the same shall become absolutely void and all the premiums paid thereon forfeited to the company if it be discovered that at the date of this policy the assured was afflicted with any mental or bodily disease or infirmity or if any untrue averment be contained in the proposal hereinbefore mentioned."

1909

PEARL LIFE ASSURANCE COMPANY v. JOHNSON. THE SAME v. GREENHALGH

It was admitted by the respondent that the deceased was admitted into the Menston Lunatic Asylum in the county of York as a person of unsound mind on March 19, 1907, and that he was discharged on one month's trial on June 26, 1907, and that he was admitted to Wakefield Lunatic Asylum in the said county as a person of unsound mind on December 30, 1907, and that he died an inmate of the last-mentioned asylum on October 11, 1908.

The respondent denied that the proposal form had ever been signed by her, as she could neither read nor write. She also denied that at the interview which she had with the company's agent on July 26, 1907, or at any other time she authorized the said agent or any other person to sign such a proposal form on her behalf.

The appellants contended that if the proposal was not signed nor authorized by her, inasmuch as it was recited that the proposal was the basis of the contract, the policy was void, and that the case would be met by a return of the premiums which had been offered to and refused by the respondent.

The magistrate found as a fact that the proposal form, of the existence of which the respondent had no knowledge, had not been signed by her, and further that neither the appellants' agent nor any other person had been authorized by the respondent on July 26, 1907, or at any other time to sign the said form as her agent, and that in all that happened the said agent had acted as the agent of the appellants and not of the respondent, and that the policy had been granted to the respondent by reason of the erroneous statement made by the appellants' agent, who was not called as a witness. He accordingly held that the policy itself was the contract between the parties and should be construed as if the words "such proposal being the basis of the contract" were no part of it, that the policy was valid, and that the matter could not be determined by a return of the premiums paid. He therefore gave judgment for the respondent for the amount claimed.

Rawlinson, K.C., and *Lilley*, for the appellants. It was a condition precedent to the existence of the contract of insurance

that there should be a proposal form signed by the respondent or by her authority. As the magistrate has found there was no such proposal, the policy must be void. It cannot be that the mere issue of the policy creates a contract, it being stipulated that it is to be on the basis of the proposal form. If, however, it is to be assumed that (apart from answers in the proposal form) there was a policy, the proposal form must be treated as standing also; and as the answers in that form were untrue, the policy was void. The fact that the person who made the untrue statements was the appellants' agent to receive proposals does not raise any equity against them. In *Biggar* v. *Rock Life Assurance Co.* (1), where the proposal form was falsely filled up by the local agent of the insurance company without the knowledge of the applicant, who signed the form without reading it, it was held that the agent in filling in the false answers was acting as the agent, not of the insurance company, but of the applicant. Wright J. said, "I cannot imagine that the agent of the insurance company can be treated as their agent to invent the answers to the questions in the proposal form."

No counsel appeared for the respondent.

PEARL LIFE ASSURANCE COMPANY *v.* GREENHALGH.

A complaint was preferred against the appellants claiming the sum of 19*l.* 18*s.* alleged to be due under a policy of insurance issued by the appellants to the respondent Henry Greenhalgh upon the life of Henry Greenhalgh, the father of the respondent. (The policy was in the same form as in Johnson's case.)

Upon the hearing of the complaint the following facts were proved or admitted:—

The respondent, a working bleacher, in the month of September, 1902, was called upon when at his work by an agent of the appellants named Eckersley, who was accompanied by a superintendent named Wilton. The said Eckersley and Wilton, or one of them, pressed him for an insurance proposal and suggested to him that he should insure his father, the said Henry Greenhalgh. In reply to the respondent's request to

(1) [1902] 1 K. B. 516.

1909

PEARL LIFE ASSURANCE COMPANY v. JOHNSON. THE SAME v. GREENHALGH.

know the rate and terms for the suggested insurance the said Eckersley and Wilton inquired the age of the said Henry Greenhalgh. The respondent gave his age as seventy-two, whereupon he was informed by the said Eckersley and Wilton, or one of them, that if he paid 1*s.* 4*d.* a week that would insure his father in the sum of 19*l.* 14*s.* and bonuses. On the faith of this assurance the respondent agreed to insure his father with the appellants. He regularly paid his 1*s.* 4*d.* a week from that date up to September 23, 1908, when his father died. He then sent in his claim to the appellants for 19*l.* 18*s.*, whereupon the appellants set up that the age had been understated by three years, and therefore the respondent was only entitled to 15*l.* 4*s.*, which was the amount as shewn by their tables. This same attitude was taken by the appellants before the justices. The respondent stated that, whatever age the appellants had in fact quoted terms for, he gave them his father's age as seventy-two. It was proved that the deceased's age was at the time of his death seventy-eight. The appellants' solicitor in cross-examination of the respondent handed him a proposal form which purported to contain a statement that the age of the deceased in September, 1902, was sixty-nine. The respondent denied that he had signed any proposal form and denied that the signature on the proposal form was his, and no evidence was given by the appellants that the proposal form was signed by the respondent. The policy of insurance issued by the appellants contained no statement of age. The appellants did not call either of their said agents Eckersley or Wilton. The appellants' solicitor thereupon contended, without calling any evidence, that it was a condition of the policy that the proposal form and the answers contained therein formed the basis of the contract between the assured and the appellants, and that if the declaration contained in the proposal form was not in all respects true the policy should be void. He claimed that such declaration was not in all respects true, and, moreover, the respondent having denied entering into the said contract in that he stated that he had not signed the proposal form, it was contended that the policy was therefore void and that the respondent could not recover in respect of it.

The justices held (*a*) that the respondent had not signed the proposal form produced, and further that he had no knowledge of the existence of any proposal form; (*b*) that it was not proved that the respondent had incorrectly stated the age of the deceased; (*c*) that if the appellants' agents had made a mistake (though the justices did not find that they had) in basing their said quotation upon the deceased's age as sixty-nine, such mistake was not induced or contributed to by the respondent and he should not suffer; (*d*) that the appellants were estopped by the issue of the policy from contending that there was no contract. They accordingly gave judgment for the respondent for the amount claimed.

Rawlinson, K.C., and *Lilley*, for the appellants, urged the same arguments as in the former case.

C. C. Scott, for the respondent. The appellants by issuing the policy and receiving the premiums have estopped themselves from disputing that there was a signed proposal and from alleging that the contract was void for want of one. If they seek to rely on misrepresentations in the proposal form, it is for them to produce the form and to shew that it is signed by the respondent.

Rawlinson, K.C., in reply. It may be that if the respondent had contented himself with denying that the particular proposal form produced was signed by him the company would have been estopped from disputing that there was a signed proposal sufficient to validate the policy. But no one can be estopped from disputing a fact which the other side admits; and here the respondent denied that he had signed "any proposal form" at all.

Cur. adv. vult.

Feb. 15. LORD ALVERSTONE C.J. read the following judgment:— These were two appeals by the Pearl Life Assurance Company against the judgments of magistrates in cases brought before them under the provisions of the Collecting Societies and Industrial Assurance Companies Act, 1896, to recover the amounts alleged to be due under two policies of assurance.

1909

PEARL LIFE ASSURANCE COMPANY v. JOHNSON.
THE SAME v. GREEN-HALGH.

Lord Alverstone C.J.

In the case of the Pearl Life Assurance Company and Johnson the policy was effected by Sarah Ann Johnson upon the life of William Johnson, and stated that it was granted in consideration (inter alia) of the proposer having signed and caused to be delivered to the company a proposal dated July 26, 1907, such proposal being the agreed basis of the contract between the company and the proposer, and it being also stipulated that if any untrue averment be contained therein as respects state of health or other circumstances all moneys paid on account of the assurance so made shall be forfeited to the company and the policy declared null and void.

The company alleged that on the card of proposal purporting to be signed by Sarah Ann Johnson the question "Is the proposed now or has he ever been afflicted with any mental or bodily disease or infirmity?" had been untruly answered, because William Johnson, the life assured, had on March 19, 1907, been confined in a lunatic asylum.

In the case of Greenhalgh the life assured was of the age of seventy-two; the company alleged that on the proposal form referred to in the policy and dated September 11 the life was stated at sixty-nine, and they claimed to pay a sum of 15*l.* 4*s.*, instead of the sum of 19*l.* 14*s.* named in the policy, being the amount, as they said, which upon the premium paid, 1*s.* 4*d.* per week, would be due in respect of a life aged seventy-two.

In Johnson's case the company had paid nothing, but Mr. Rawlinson suggested they were liable to repay the premiums, but not liable for 13*l.* 16*s.*, the amount insured.

In our opinion the assurance company are liable for the amount insured on both policies, and both appeals must be dismissed. In both cases they have issued policies and received premiums. It is quite true that these policies purport to be made on the basis of proposals, and the policy in each case contains a condition that if any statement in the proposal is untrue the policy is void and all premiums are forfeited. But in both cases the justices have found that the alleged proposals were not in fact signed by the proposers, nor had they any knowledge of the contents or given any authority to make the statements.

In our opinion, therefore, if the assurance company attempt to rely on breach of the condition they must fail, because no proposal was in fact made which can be said to be the basis of the contract, and the company, having issued the policy and received the premiums, are estopped from saying that there is no policy, unless they can prove that an untrue proposal was made by or with the authority of the proposer.

In Greenhalgh's case the policy itself does not mention the age, so that it is only by proving a false statement by the proposer that the company could succeed, and this the company have failed to do. For these reasons we are of opinion that both appeals should be dismissed with costs.

WALTON J. In each of these cases the company set up as a defence to the claim of the assured that there was a misstatement in the proposal signed by the assured, and they failed to prove that defence. They indeed produced proposals purporting to be so signed, but the magistrates found that the proposals were not in fact so signed, and therefore the defence set up failed. But then the company said that having regard to the form and nature of the contract appearing upon the policies, which were expressed to be made "in consideration of the person who is named and described in the first column of the schedule embodied herein"—that is the proposer—"having signed and caused to be delivered to the Pearl Life Assurance Company Limited a proposal bearing date . . . . being the agreed basis of the contract between the company and the proposer," if there was in fact no proposal, the contract was void and could not be enforced. Now it appears to me that the company cannot set up that defence. The policy is a deed and contains a recital that there was *a* proposal. By that recital I think the company are estopped. It may be suggested that the assured are not entitled to rely upon any such estoppel, inasmuch as they invited the justices to find, and the justices did find, that there was no proposal at all. With regard to that the answer is that it was not necessary for the purposes of the assured's case to prove that there was no proposal. All that they had to do was to prove that the proposal form produced and relied upon by the company

1909

PEARL LIFE ASSURANCE COMPANY v. JOHNSON. THE SAME v. GREENHALGH.

was not signed by them or with their authority. The fact that it came out before the justices that there was no proposal at all was for the purposes of their case a purely irrelevant matter, and ought not to be treated as preventing them from taking the benefit of the estoppel contained in the policy which was issued to them and upon which they paid their premiums.

JELF J. I am of the same opinion. For some time I was under the impression that in these cases there was no contract, but on consideration I think the case can be put in the way in which it was put by my Lord and my brother Walton. It seems to me that both parties were estopped from denying that the policy was granted upon the basis of a proposal. But when it came to the company setting up as a defence to the policy that there were false statements in that proposal, it was incumbent on them to produce the proposal to shew what the false statements were; and the proposal which they produced turned out in each case to be no proposal at all, because it was neither signed nor authorized by the assured. Consequently the company fail in their defence, and ought to pay what on the face of the policy they undertook to pay.

Appeal dismissed.

Solicitor for appellants: *J. M. Storer.*

Solicitors for respondent Greenhalgh: *Nicol, Son & Jones.*

J. F. C.

In re AN ARBITRATION BETWEEN THE BRISTOL GAS COMPANY AND THE BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED.

1909
April 28.

Tramway—Additional Expense imposed on Gas Company by reason of existence of Tramway—Liability of Tramway Company—Interruption of Tramway Traffic—Laying down, repairing, altering, or removing new Service Pipe—Repairing, altering, or removing Service Pipe or Main laid before Construction of Tramway—Connecting new Service Pipe with old Main—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 32, *sub-ss.* 2, 5.

By s. 32 of the Tramways Act, 1870, "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any . . . . company . . . . for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas . . . . but in the exercise of such power every . . . . company . . . . shall be subject to the following restrictions; . . . .

"(2.) Before they commence any work whereby the traffic on the tramway will be interrupted they shall . . . . give to the promoters . . . . notice of their intention to commence such work . . . .

"(5.) Any company shall not execute such work so far as it immediately affects the tramway except under the superintendence of the promoters, unless they refuse or neglect to give such superintendence at the time specified in the notice for the commencement of the work . . . . and they shall execute such work at their own expense and to the reasonable satisfaction of the promoters: Provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, ... shall have been laid before the construction of such tramway shall be borne by the promoters":—

Held, that the proviso in sub-s. 5 of s. 32 applies so as to entitle a gas company to claim from a tramway company an additional expense imposed upon them by reason of the existence of the tramway, although the work in respect of which the additional expense is incurred does not cause an interruption of the tramway traffic within the meaning of sub-s. 2.

Held, further, that "additional expense" within the meaning of the proviso does not include the additional expense, caused by the existence of the tramway, of laying down a new service pipe for the first time since the construction of the tramway, nor of repairing, altering, or removing it; but that it does include the additional expense of connecting a new service pipe with a main (involving the drilling of a hole in the main) laid before the construction of the tramway, and of repairing, altering, or removing any service pipe or main laid before that time.

A gas company executed certain work in laying and repairing their

1909

BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED, *In re.*

service pipes and mains. In one instance during the execution of the work, where there was a double tram line, the cars of one line were diverted to the other line and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas.

In all the other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the workmen of the gas company to get out of the trenches under or near the tram lines where they were at work on the pipes of the gas company.

Flags and danger boards were put up by the gas company to warn the tram drivers of the fact that men were working in the trenches, and in some cases additional watchmen were employed by the gas company to warn their workmen of the approach of trams:—

Held, that these facts constituted in law an "interruption" within the meaning of sub-s. 2 of s. 32.

AWARD in the form of a special case stated by a referee appointed at the instance of the Bristol Gas Company by the Board of Trade in pursuance of the powers vested in them by s. 33 of the Tramways Act, 1870. (1)

The gas company alleged that by reason of the lines of the Bristol Tramway and Carriage Company, Limited, having been laid over the mains of the gas company, and by reason of the existence of the tramway, the gas company had incurred additional expense in obtaining access to its mains and in altering and connecting service pipes with the mains in excess of the expense which would have been incurred in making the alterations and connections if the tramway had not been laid over the mains.

The facts (so far as material) were as follows:

From February 16, 1905, to December 28, 1906, both inclusive, the work hereinafter mentioned was carried out by the gas company upon portions of its undertaking. All the gas mains hereinafter referred to were laid prior to the construction of the tramway. Some of the service pipes were laid before and some after the construction of the tramway. The gas company alleged that by reason of the existence of the tramway company's

(1) Sect. 33 of the Tramways Act, 1870, provides that any difference "between the promoters . . . . and any . . . . gas company" is to be settled by a referee appointed by the Board of Trade on the application of either party.

tramway in the roads or places where the gas company's mains had been previously laid additional expense had been imposed upon the gas company in doing the following classes of work :—

Class A. Laying down a new service pipe and connecting the same (for the first time since the construction of the tramway) with a main laid before the construction of the tramway.

Class B. Repairing, altering, or removing a service pipe laid since the tramway was constructed, the main having been laid before the construction of the tramway.

Class C. Repairing, altering, or removing a service pipe or a main laid before the tramway was constructed.

The additional expense for the above-mentioned classes of work respectively was as follows :

	£	*s.*	*d.*
Under Class A	63	19	8
„ „ B	14	1	8
„ „ C	37	16	8
	£115	18	0

On each occasion before commencing work the gas company duly gave the tramway company notice under s. 32, sub-s. 2, of the Tramways Act, 1870, of its intention to commence work.

The tramway company refused to pay to the gas company any part of the 115*l.* 18*s.*

In no case did the tramway company give any superintendence during the execution of the work.

In one instance, where there was a double tram line, the cars of one line were diverted to the other line and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas.

In all the other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the gas company's workmen to get out of the trenches under or near the tram lines where they were at work on the gas company's pipes.

1909

BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED, *In re.*

Flags and danger boards were put up by the gas company to warn the tram drivers of the fact that men were working in the trenches, and in some cases additional watchmen were employed by the gas company to warn their workmen of the approach of trams.

Connecting a new service pipe with a main in each case involved the drilling of a hole in the main.

At the request of the parties the following questions (among others) were drawn up by the referee and agreed to by both parties as correctly raising such questions of law and construction, and the referee made the following answers thereto :—

Q. (1.) Does the proviso in sub-s. 5 of s. 32 of the Tramways Act, 1870, apply if the work claimed for does not cause an interruption of tramway traffic within the meaning of sub-s. 2? A.—Yes.

Q. (2.) Do the facts proved in this case which are admitted constitute in law "interruption" within the meaning of sub-s. 2? A.—Yes.

Q. (3.) It being admitted that in each case the gas mains were laid before the construction of the tramways, is the additional expense claimed by the gas company "additional expense" within the meaning of s. 32, sub-s. 5, of the Tramways Act, 1870, when such additional expense has been incurred in doing the following classes of work or either of them respectively :—

Class A. Laying down a new service pipe and connecting the same for the first time since the construction of the tramway with a main laid before the construction of the tramway? A. —No as to laying down new service pipes. Yes as to connecting them with the old mains, on the ground that making the connections alters the mains within the meaning of the section.

Class B. Repairing, altering, or removing a service pipe laid since the tramway was constructed, the main having been laid before the construction of the tramways? A.—No.

Class C. Repairing, altering, or removing a service pipe or a main laid before the tramway was constructed? A.—Yes.

The referee answered each of the above questions subject to the opinion of the Court whether each of his answers was right in law, and made his award accordingly.

The question for the opinion of the Court was whether the referee's findings on the questions of law and construction were correct.

Sir A. Cripps, K.C., Bethune, and *F. E. Weatherly* (*R. Cunningham Glen* with them), for the Bristol Gas Company. Upon the true construction of the proviso contained in s. 32, sub-s. 5, of the Tramways Act, 1870, the gas company is entitled to recover from the tramway company any additional expense it has incurred with regard to any of the work included in class A, B, or C where any pipes belonging to it were laid down before the construction of the tramway in a road in which the work is done. The meaning of the proviso is that, if the gas company is first in occupation of a road by its pipes, the tramway company is to be allowed to construct its tramway there upon the terms that if in consequence of the existence of the tramway any additional expense is incurred by the gas company in doing any of the work mentioned in s. 32 of the Act of 1870 it should be entitled to recover that expense from the tramway company. The intention of the Legislature was that where the gas company already had mains or pipes put down under statutory authority it should not be placed in a worse position by reason of the statutory authority subsequently given to the tramway company to construct its tramway. In the first part of s. 32 the word "pipe" includes a service pipe as well as a main, and the words "such pipes" in the proviso contained in sub-s. 5 mean any pipes which have been laid down before the construction of the tramway and are similar to any pipes the gas company subsequently lays down. In respect of all those pipes, whether laid down before or after the construction of the tramway, the gas company is entitled to be paid any additional expense imposed upon it by reason of the existence of the tramway. The result is that, if a pipe was in situ before the construction of the tramway, any additional expense to the gas company in dealing with that pipe caused by the construction of the tramway must be borne by the tramway company.

Simon, K.C. (*Balfour Browne, K.C.*, with him), for the Bristol Tramways Company, Limited. The words "such work" in

1909

BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED, *In re.*

sub-s. 5 of s. 32 of the Tramways Act, 1870, mean work mentioned in sub-s. 2 whereby the traffic on the tramway will be interrupted. The proviso of sub-s. 5 cannot have a wider meaning than the sub-section itself. The effect therefore is that the gas company is only entitled to any additional expense caused to it by the existence of the tramway where the traffic on the tramway is actually interrupted by the work it is doing. Sect. 33 provides against the gas company improperly interrupting the traffic by enacting that there is to be a reference to an engineer or other fit person appointed by the Board of Trade if any difference arises in relation to any work done by any company to whom any tube belongs. Sub-s. 5 of s. 32 clearly contemplates a notice being given of intention to commence work, and sub-s. 2 provides in effect that notice need only be given where the traffic on the tramway will be interrupted. Therefore the additional expense caused by the existence of the tramway can only be claimed under sub-s. 5 where the traffic on the tramway is interrupted.

The facts found by the referee do not constitute an "interruption" to the traffic within the meaning of s. 32, sub-s. 2. By interruption is meant a break in the service of tramcars. The referee was therefore wrong in holding that merely diverting the cars from one line to another and causing them to be slowed down or brought to a standstill for a short time constituted an interruption in law. The referee was wrong in holding that the gas company is entitled to recover any additional expense in respect of connecting new service pipes with the old mains. There is no distinction in principle between laying down a new service pipe and connecting it with a main. A service pipe is not laid down until a connection is made with it at each end. The effect of sub-s. 5 of s. 32 is that the gas company is only entitled to recover additional expense in respect of mains, pipes, or tubes which have been actually laid down before the construction of the tramway.

Bethune, in reply. It was the intention of the Legislature that after a gas main was laid, whatever additional burden was placed on the gas company by reason of the construction of the tramway should be borne by the tramway company. There is no

reason for drawing a distinction between making an alteration to an existing service pipe and laying down a new one.

PHILLIMORE J. I am of opinion that all the answers given by the referee are right. As to question 1, the construction placed upon s. 32 of the Tramways Act, 1870, by the referee was, in effect, that any company may use its powers to lay down, repair, alter, or remove any pipe, but in the exercise of such powers it shall be subject to certain restrictions which are mentioned, provided that any additional expense imposed on the company by reason of the existence of the tramway shall be borne by the tramway company. Although I recognize that there are considerable difficulties in construing the section, I think there is so little reason founded on good sense why the additional expense imposed on a gas company by the existence of a tramway should be repaid to it when it contrives to interrupt the traffic, but should not be repaid to it when it does not, that not being compelled by the language of the statute to hold that that is the true construction I do not do so. I agree with the decision of the referee upon that point.

As to question 2, I also agree with the referee that the facts which he found amount in law to an "interruption" within the meaning of sub-s. 2 of s. 32 of the Act of 1870. There is this difficulty in the contrary view. Upon the assumption that additional expense is only to be allowed to the gas company when the traffic is interrupted, it must be because that class of expense will be due to the prolongation of the gas work by reason of the fact that on the one hand the gas company's workmen interrupt the tramway traffic, and on the other hand the tramway traffic interrupts the gas company's workmen. That is exactly the class of actual interruption which took place in the present case, and which the referee has found to be interruption in law. I therefore agree with his decision upon that point.

As to question 3, on behalf of the gas company it is suggested that wherever it is in occupation of a road by reason of having a main laid down, whether or not with service pipes, it is entitled, upon the true construction of the Act of 1870, to lay down any new service pipes it may need by reason of further demands for

1909

BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY, LIMITED, *In re.*

Phillimore J.

gas, and to be considered as still the first occupant and entitled to claim from the tramway company any extra expense incurred in laying down the new service pipes, and, when once laid down, of altering and repairing them and of taking them up. In support of that view it may be said that the gas company was there before the tramway; it has undertaken a considerable capital expense, and is under many statutory duties and many statutory restrictions, for example as to its dividends, and it is only fair that it should be allowed to fully develop. On the other hand it may be said that it is quite true that the status quo ought to be maintained. The gas company had certain mains and pipes when the tramway company came there. The gas company is at liberty to restore, take up, slightly alter the position of, put down, or repair those mains and pipes, and the tramway company must pay the extra expense caused by the existence of the tramway. But if the gas company is going to further develop, it ought to be at its own cost. Either view may very well be accepted. I imagine that in practice further development will only happen where the building area is increasing, and possibly where the social position of the occupants of houses or the standard of comfort is increasing also. As a rule, new service pipes (I do not mean new physical pipes replacing old ones, but new lines of pipes laid for the first time) will only be required because new houses are being built, or because the standard of comfort in the existing houses is raised, for example where a cottage is replaced by a house or villa. Where that is so the condition of things will be that the gas mains have been laid before the construction of the tramways and are in existence as a channel of communication between the gasworks and that part of the town where gas is already in use, and the gas company is to the extent of each main and of any service pipes already laid in possession, but it is not in possession any further, and if a main has to come up, or if the position of the main in the street has to be altered, the gas company will be entitled to the extra expense of that; if any of the existing service pipes have to come up, it will also be entitled to the extra expense caused by the existence of the tramway. But the whole expense of laying down new service pipes which are feeders

to new houses ought, I think, in good sense to be left to the gas company, and the tramway company ought to be considered as being to that extent in occupation before the gas company.

As to the language of the proviso to sub-s. 5 of s. 32, it is capable of almost any construction. That being so, I am of opinion, on broad principle, that the referee's conclusion as to its true construction is right, and that the gas company now possesses as much as it possessed before the existence of the tramway, but no more—that part only which it previously occupied with its pipes—subject as a matter of good sense to the qualification that if the line in which the main or service pipe lies is only slightly altered, and consequently the service pipe to the same house or building is taken to a slightly different point in the main, that alteration would be an alteration within the meaning of the section, and the gas company would be in occupation and entitled to any additional expense in carrying out the alteration caused by the existence of the tramway.

The point as to which I have the most difficulty is the smallest, namely, whether the referee was right in holding that connecting a new service pipe with a main, which involved drilling a hole in the main, is an alteration in the main within the meaning of s. 32; in other words, that although the connection was made for the purpose of a new service pipe, it is nevertheless in fact an alteration of the main, which is an old pipe. The language of s. 32 is "altering . . . . any pipe for the supply of gas," and no doubt drilling a hole in a main may be said to be altering it. I have come to the conclusion that the purpose of the alteration ought not to be scrutinized too closely, and, that being so, I think the referee was right upon this point also.

Award affirmed.

Solicitors for Bristol Gas Company: *Meredith, Roberts & Mills, for T. D. Sibly, Bristol.*

Solicitors for Bristol Tramways Company, Limited: *Stanley, Wasbrough, Doggett & Baker, for Stanley, Wasbrough & Doggett, Bristol.*

J. E A.

C. A.
1909
May 7.

[IN THE COURT OF APPEAL.]

BURR *v.* SMITH AND OTHERS.

Defamation—Libel — Absolute Privilege — Official Receiver in Companies' Liquidation—Observations published to Creditors and Contributories of Company in Liquidation—Inspector-General in Companies' Liquidation—General Annual Report of Board of Trade—Companies (Winding up) Act, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 27, 29; *First Schedule, s.* 3.

An action for libel will not lie against an official receiver in respect of observations on the affairs of a company in liquidation published by him to the creditors and contributories of the company in the performance of his duty as prescribed by the Companies (Winding up) Act, 1890, First Schedule, s. 3, such observations being absolutely privileged.

Where an officer appointed by the Board of Trade under the Companies (Winding up) Act, 1890, s. 27, had, in the performance of his duty, prepared for and delivered to that Board a report on matters within s. 29, sub-s. 2, of the Act for the purpose of its being laid by them before Parliament as part of their general annual report as directed by that sub-section:—

Held, that an action for libel would not lie against him in respect of statements contained in that report.

APPEAL from an order made by Lawrance J. at chambers affirming an order of a Master by which an action was dismissed as after mentioned.

The action was for libel against three defendants, namely, John Smith, George Stapylton Barnes, and Harold de Vaux Brougham.

In his statement of claim the plaintiff complained that the defendant Barnes, who was one of the official receivers in companies' liquidation attached to the High Court of Justice, had, in the month of April, 1899, in his "official report" in the matter of the liquidation of a company, called the Colliery and General Contract Company, Limited, which was then being compulsorily wound up, falsely and maliciously published certain defamatory statements concerning the plaintiff in relation to his promotion of and connection with the said company. (1) The document so referred to as the defendant's "official report" appeared to be the

(1) It has not been thought necessary for the purposes of the points of law here reported to set out the alleged libels, which were somewhat lengthy. It appears to be sufficient to state that they all concerned matters connected with the companies in question.

summary of the company's statement of affairs, including the causes of its failure, and observations thereon, which, in the performance of his duty under the Companies (Winding up) Act, 1890, First Schedule, s. 3, the defendant Barnes had sent to the creditors and contributories of the company.

The plaintiff further complained that the defendant Brougham, who was one of the official receivers in companies' liquidation attached to the High Court of Justice, had on April 30, 1901, in his "official report" in the matter of the liquidation of a company, known as the Capital Finance Company, Limited, which was then being compulsorily wound up, falsely and maliciously published certain defamatory statements concerning the plaintiff in relation to his connection with the said company. The document so referred to as the defendant's "official report" appeared to be the summary of the company's statement of affairs, including the causes of its failure, and observations thereon, which, in the performance of his duty under the Companies (Winding up) Act, 1890, First Schedule, s. 3, the defendant Brougham had sent to the creditors and contributories of the company.

The plaintiff further complained that the defendant Smith, who was described as the "Inspector-General in Companies' Liquidation," had in the month of August, 1900, in his "annual report," falsely and maliciously published certain defamatory statements concerning the plaintiff in relation to his promotion of and connection with the before-mentioned Colliery and General Contract Company, Limited. The defendant Smith was an officer appointed by the Board of Trade under the Companies (Winding up) Act, 1890, s. 27; and the document so referred to as his "annual report" appeared to be a report on matters within s. 29, sub-s. 2, of the Companies (Winding up) Act, 1890, prepared by him for the Board of Trade in the performance of his duty as such officer for the purpose of its being laid by that Board before both Houses of Parliament as part of their general annual report in pursuance of that sub-section. The document was headed "Report by the Inspector-General in Companies' Liquidation on the general working of the Companies (Winding up) Act, 1890, for the year ending December 31, 1899." It was

C. A. 1909

BURR v. SMITH.

addressed to the secretary of the Board of Trade, and by him presented to the President of that Board, and was subsequently laid by him before, and ordered to be printed by, Parliament. (1)

An application was made on behalf of the defendants at chambers to strike out the statement of claim as disclosing no reasonable cause of action, and to dismiss the action as frivolous and vexatious on the ground (among others) that, the statements complained of as libellous being absolutely privileged, the action could not lie. (2) The Master allowed the application, and on appeal Lawrance J. affirmed his decision.

Hume Williams, K.C. (*J. R. Bell Hart* with him), for the plaintiff. The order dismissing the action was made on the authority of the decision of Channell J. in the case of *Bottomley* v. *Brougham*. (3) It is submitted that that case was wrongly decided. There the official receiver had made a report under sub-s. 2 of s. 8 of the Companies (Winding up) Act, 1890, and it was held that such a report was absolutely privileged. Sub-s. 1 of s. 8 of the Act provides that, where the Court has made an order for winding up a company, the official receiver "shall" submit a preliminary

(1) The Companies (Winding up) Act, 1890, s. 27, sub-s. 1, provides that "the Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution of this Act, and may dismiss any person so appointed."

Sect. 29: "(1.) The officers of the Courts acting in the winding up of companies shall make to the Board of Trade such returns of the business of their respective Courts and offices, at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches.

"(2.) The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act to be prepared and laid before both Houses of Parliament."

The First Schedule to the Act, s. 3, provides that "The official receiver shall also, as soon as practicable, send to each creditor mentioned in the company's statement of affairs, and to each person appearing from the company's books, or otherwise, to be a contributory of the company, a summary of the company's statement of affairs, including the causes of its failure, and any observations thereon which the official receiver may think fit to make."

(2) Other grounds were put forward for the application, but the view taken by the Court of Appeal made it unnecessary to go into these.

(3) [1908] 1 K. B. 584.

report to the Court as to certain matters. That is an absolute duty imposed upon him. Then by sub-s. 2 of the section it is provided that he "may also, if he thinks fit," report whether in his opinion any fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer in relation to the company since its formation. That merely gives him a discretion to make a report, if he thinks fit, and does not impose upon him a judicial duty to do so. The exercise of such a discretion is not, it is contended, the subject of an absolute privilege under the law of libel. There is no reason why an official, who, under the guise of exercising such a discretion, falsely and with actual malice defames another, should be absolutely privileged against an action. But, even assuming the decision in *Bottomley* v. *Brougham* (1) to be correct, it does not apply to the report made by the official receiver under s. 3 of the First Schedule to the Companies (Winding-up) Act, 1890. There cannot be any absolute privilege attached to that report, which is not in any sense a judicial report. It appears from the authorities that the absolute privilege against an action for defamation here in question only applies to judicial proceedings in a Court, or before a tribunal analogous to a Court. In *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2) Lord Esher M.R., speaking of this absolute privilege, said: "It is applicable to all kinds of Courts of justice; but the doctrine has been carried further; and it seems that this immunity applies wherever there is an authorized inquiry, which, though not before a Court of justice, is before a tribunal which has similar attributes. In the case of *Dawkins* v. *Lord Rokeby* (3) the doctrine was extended to a military court of inquiry. It was so extended on the ground that the case was one of an authorized inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it. This doctrine has never been extended further than to Courts of justice and tribunals acting in a manner similar to that in which such Courts act." The official receiver cannot be said to be

(1) [1908] 1 K. B. 584. (2) [1892] 1 Q. B. 431, at p. 442.
(3) (1875) L. R. 7 H. L. 744.

C. A. 1909

BURR v. SMITH.

holding a judicial inquiry, or to be acting in judicial proceedings, in the sense indicated by Lord Esher, when acting under s. 3 of the First Schedule to the Companies (Winding up) Act, 1890. [He also cited on this point *Scott* v. *Stansfield* (1); *Munster* v. *Lamb*. (2)] The qualified privilege arising from a privileged occasion would, it is submitted, afford sufficient protection in such a case; and, if, as must be assumed for the purposes of the present appeal, the defendants Barnes and Brougham have, under colour of exercising their functions under the Act, made false statements concerning the plaintiff, being actuated thereto by actual malice towards him, they ought not to be absolutely privileged against an action. It is submitted that in any case the Court ought not to dismiss the action summarily, but to leave the important questions thereby raised to be determined at the trial in the usual way.

The case of the defendant Smith stands on a different footing from the cases of the other defendants. He is an officer of the Board of Trade, not an officer of the Court, and in drawing up and publishing the report complained of he cannot be said to have been engaged in a judicial or quasi-judicial proceeding, or to have been acting as a judicial officer.

Sir W. S. Robson, *A.-G.*, and *Rowlatt*, for the defendants, were not called upon to argue.

FLETCHER MOULTON L.J. I think that the order made by the learned judge was right and that this appeal should be dismissed. The points involved are undoubtedly of considerable importance. The plaintiff brings this action against three defendants, of whom two, namely, Mr. Barnes and Mr. Brougham, are official receivers in companies' liquidation attached to the High Court, and the third defendant, Mr. Smith, is described as "Inspector-General in Companies' Liquidation." I propose to treat the claims against the first-mentioned two defendants separately from the claim against the third defendant.

The statements complained of as against the defendants Mr. Barnes and Mr. Brougham are contained in reports made by them respectively as official receivers under the First Schedule

(1) (1868) L. R. 3 Ex. 220. (2) (1883) 11 Q. B. D. 588.

to the Companies (Winding up) Act, 1890, s. 3, which is in the following terms:—"The official receiver shall also, as soon as practicable, send to each creditor mentioned in the company's statement of affairs, and to each person appearing from the company's books, or otherwise, to be a contributory of the company, a summary of the company's statement of affairs, including the causes of its failure, and any observations thereon which the official receiver may think fit to make." I have no doubt that official receivers are officers of the Court which has to deal with the liquidation of companies, that is to say, of this Court, and that, in cases of the compulsory liquidation of a company, as these were, the official receiver is acting as an officer of the Court in performing the statutory duty imposed upon him by s. 3 of the First Schedule. It would be a perilous duty, if the contention for the plaintiff were well founded, because it necessitates his stating with the greatest frankness all the matters which he may have ascertained of the kind referred to by the section. In doing that he is performing his duty as an officer of the Court in connection with an inquiry which may, in my opinion, rightly be termed a judicial inquiry for the purposes of the law of libel. I have no doubt that the performance of such a duty is a matter which is absolutely privileged. Where an officer of the Court is placed, in the performance of his official duty, in the difficult position of having to draw up and circulate such a report as is provided for in s. 3, it appears to me clear that he is entitled to the same amount of protection as is extended to a judge who, after a judicial inquiry, performs his duty by fearlessly pronouncing his judgment as to the matters brought before him, and therefore his report is absolutely privileged. The results would be most unfortunate if the same privilege did not apply to such a report as to all other judicial proceedings, and if the official receiver could only perform his duty under the section at the peril of having an action brought against him. This point was decided by a Court of first instance in *Bottomley* v. *Brougham* (1), and the reasons for his judgment there given by Channell J. appear to me to be most admirably expressed and perfectly accurate. He said: "It is not that there is any

(1) [1908] 1 K. B. 584.

C. A. 1909

BURR v. SMITH.

Fletcher Moulton L.J.

privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice; that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants, should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious." I do not think that I need say any more as to the claims against those two defendants.

The action as against the third defendant stands on a different footing. By s. 29 of the Companies (Winding up) Act, 1890, it is provided as follows: "(1.) The officers of the Courts acting in the winding up of companies shall make to the Board of Trade such returns of the business of their respective Courts and offices at such times and in such manner and form as may be prescribed, and from such returns the Board of Trade shall cause books to be prepared which shall, under the regulations of the Board, be open for public information and searches. (2.) The Board of Trade shall also cause a general annual report of all matters, judicial and financial, within this Act to be prepared and laid before both Houses of Parliament." When the section provides that the Board of Trade shall cause a general annual report to be prepared, it is obvious that, as the Board of Trade can only perform this duty by its officers, it means that the Board shall set its officer or officers to prepare such a report. It is not necessary for the purposes of my judgment to consider whether the Inspector-General, who is an officer appointed by the Board of Trade, is or is not for any purposes an officer of this Court. The ground upon which I base my judgment is that the defendant was acting as an officer of the Board of Trade, who had to prepare this report in order to enable that Board to perform their statutory duty under s. 29. In collecting the materials for and preparing this report he may be said to have acted as the hand of the Board of Trade; and in communicating this report to that Board I do not think he was

communicating it to any other body than that of which he was for this purpose, so to speak, a component part. I hold that the coming of this report into the hands of the superior officials of the Board cannot be looked upon as a publication of it for the purposes of the law of libel. It was simply part of the preparation of their report by the Board of Trade for the purposes of s. 29. But further—the Board of Trade have not only to prepare the report, but also to lay it before both Houses of Parliament. By adopting the report, and presenting it to Parliament, they made it their report. They are bound by statute to present it to Parliament, and I am satisfied that their doing so is not a publication in respect of which the Board or any of its officials can be made liable under the law of libel. When the report is so presented, Parliament may order it to be printed and distributed to its members and sold to the public; but of course this defendant cannot be responsible for the publication which may so take place. In my opinion, therefore, there has been no publication of the statements contained in this report by the defendant for which he can be made liable in an action of libel. The result is that the action cannot be maintained against any of the defendants. The Court has an inherent power of dismissing an action on the ground that it is frivolous and vexatious, and it is not necessary for the exercise of that power that the statement of claim should be, on the face of it, demurrable. It may be exercised if, upon facts which are brought before the Court, or of which they may take judicial cognizance, the action is clearly shewn to be frivolous and vexatious. For the reasons which I have given it appears to me that this action is shewn to be of that character, and therefore this appeal should be dismissed.

FARWELL L.J. I have come to the same conclusion. As regards the official receivers the case appears to me to be reasonably plain. The plaintiff's counsel, in dealing with the case of *Bottomley* v. *Brougham* (1), argued, with respect to sub-s. 2 of s. 8, that the sub-section gave a discretion to the official receiver, and thereby differentiated the position of that official, who is undoubtedly an officer of the Court, from his

(1) [1908] 1 K. B. 584.

C. A. 1909

BURR v. SMITH.

Farwell L.J.

position in cases where an absolute duty is imposed upon him. Sub-s. 1 of s. 8, in which the word "shall" is used, undoubtedly imposes an absolute duty on the official receiver. Then sub-s. 2 provides that he "may also, if he thinks fit, make a further report or further reports, stating the manner in which the company was formed, and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court." The object of the sub-section is that, if there is any ground for suspicion in the case of a company which is being wound up, the receiver, as an officer of the Court, shall make an inquiry and report to the Court whether there has been any fraud. Unless and until the official receiver reports that there has, to the best of his belief, been fraud, the Court cannot proceed to take the further steps contemplated by sub-s. 3. It is a misapprehension to suppose that there is not a judicial duty cast upon the official receiver under sub-s. 2. The moment that, in the exercise of his discretion, after having considered the facts, he has come to the conclusion that they indicate fraud, his discretion is merged in a duty, and it becomes his duty to make a report to that effect. If any authority were wanted for that, the observations of Lord Halsbury in *Ex parte Barnes* (1) may be referred to as being such an authority. He said: "The expression 'if he thinks fit' must of course mean, if he arrives at a judicial conclusion in his own mind that such facts are before him, and in proof, that it becomes his duty." That disposes of the suggestion that the exercise by the official receiver of his discretion under sub-s. 2 of s. 8 is not entitled to the absolute protection accorded by the law to the exercise of a judicial duty.

The third defendant is described as the "Inspector-General in Companies' Liquidation." I have found some difficulty in ascertaining his exact position. He appears, however, to be an officer appointed by the Board of Trade under s. 27 of the Companies (Winding up) Act, 1890. It is provided by that

(1) [1896] A. C. 146, at p. 150.

section that the Board of Trade may, with the approval of the Treasury, appoint such additional officers as may be required by the Board for the execution of this Act; and by s. 29 of the Act it is provided that the officers of the Courts acting in the winding up of companies shall make to the Board of Trade returns of the business of their respective Courts and offices as prescribed, and that the Board of Trade shall cause a general annual report of all matters, judicial and financial, within the Act to be prepared and laid before Parliament. It seems to me that the officers so appointed, and by whom these reports have to be prepared, are treated by the Act as performing their duty as officers of the Court. Until I heard the suggestion of counsel for the defendants during the argument (1), I was not aware that it had ever been doubted that officers appointed under s. 27 are officers of the Court, though they are appointed by the Board of Trade. They are appointed to assist the Court in the execution of the Act, and in my opinion the defendant Smith, in making the report which he did, was acting as an officer of the Court, and was as such entitled to absolute protection from any action for libel. The privilege accorded by the law in cases of this kind is a most important matter. It exists, as was pointed out in *Munster* v. *Lamb* (2), for the public benefit. Brett M.R. there said (3), speaking of the decision in *Scott* v. *Stansfield* (4): "The ground of the decision was that the privilege existed for the public benefit: of course it is not for the public benefit that persons should be slandered without having a remedy; but, upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty." In the same case Fry L.J. (5) said, with regard to the rule of law by which a judge or a witness who falsely and maliciously makes defamatory statements in the course of a judicial proceeding is nevertheless protected from

(1) During the argument counsel for the defendants stated that he should not contend that the Inspector-General was an officer of the Court.

(2) 11 Q. B. D. 588.
(3) Ibid. at p. 603.
(4) L. R. 3 Ex. 220.
(5) 11 Q. B. D. 588, at p. 607.

C. A. 1909

BURR v. SMITH.

Farwell L.J.

an action for libel, "The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because, if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that, if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty." And later on he said, "Nothing could be more inconvenient than to allow actions of this description to be brought . . . . if such actions were allowed, persons performing their duty would be constantly in fear of actions." It seems to me that the same considerations are applicable to the present case. I do not see any difference, in point of principle, between the position of the official receivers and the Inspector-General in Companies' Liquidation in making these reports and that of a chief clerk of a judge in the Chancery Division in reporting on a case to the judge. No one has ever dreamed of suggesting that in such a case the chief clerk would be liable to an action for libel. On this ground, and without expressing any opinion on the question whether there was publication of the matter complained of by the defendant Smith, I am of opinion that the action should be dismissed as regards him as well as the other defendants.

Appeal dismissed.

Solicitor for plaintiff: *W. Stopher.*

Solicitor for defendants: *Solicitor to the Board of Trade.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1909
April 21;
May 14.

LONDON COUNTY COUNCIL *v.* METROPOLITAN RAILWAY COMPANY AND OTHERS.

Metropolis—General Line of Buildings in Street—Buildings erected beyond the General Line—Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 (*repealed*)—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 27, 216.

By s. 75 of the Metropolis Management Amendment Act, 1862 (which section was repealed by the London Building Act, 1894), it was provided that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street or within fifty feet of the highway, such general line of buildings to be decided by the superintending architect to the board; and any building so erected without such consent was liable to be demolished as therein provided. Sect. 22 of the London Building Act, 1894, in substance, re-enacted the provisions of the above-mentioned section, substituting the London County Council and their superintending architect for the Metropolitan Board of Works and their architect. By s. 27 of the London Building Act, 1894, the consent of the London County Council to the erection of any building beyond the general line of buildings in any part of a street, or the erection of such building, shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent. By s. 216 of that Act all by-laws, regulations, orders, consents, conditions, and notices duly made, given, imposed, or issued under any Act repealed by that Act are, so far as applicable for the purposes of the Act, to be of the same validity and effect as if they had been made, given, imposed, or issued under the provisions of that Act.

The superintending architect appointed by the London County Council was called upon to define the general line of buildings in a part of a certain street in the metropolis in the following circumstances. Along the part of the street in question stood a number of old houses built before the year 1862. In front of these houses, and between them and the pavement line of the street, there were originally forecourts or open spaces. At the date of the application to the superintending architect there had been erected, with the consent of the Metropolitan Board of Works, upon the forecourts or open spaces in front of a number of the old houses, shops of one storey projecting from the fronts of the old houses up to the pavement line of the street. The consent of the board to the erection of each of these shops was given upon the condition that it should be of one storey only, and

C. A.

1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

should not be at any time altered or raised without the consent of the board.

The superintending architect certified that the frontage line of the old houses was the general line of buildings in the part of the street in question. On appeal from this decision under s. 25 of the London Building Act, 1894, to the tribunal of appeal constituted under s. 175 of the Act, that tribunal, taking into consideration the shops so erected as aforesaid, fixed as the general line of buildings in that part of the street the frontage line of these shops. On a case stated by the tribunal of appeal, the Divisional Court held that under the circumstances there was nothing in point of law to prevent them from so deciding:—

Held by the Court of Appeal (Fletcher Moulton L.J. and Farwell L.J., Sir J. C. Bigham, President, dissenting), that the erection of the shops as aforesaid could not have the effect of altering the original general line of buildings, and therefore the tribunal of appeal were wrong in taking those shops into consideration in fixing the line of buildings.

Decision of Divisional Court, reported [1909] 1 K. B. 116, reversed.

APPEAL from the judgment (1) of a Divisional Court (Lord Alverstone C.J. and Walton J.) upon a case stated under s. 182 of the London Building Act, 1894, by the tribunal of appeal constituted by s. 175 of the Act on an appeal to them from the certificate of the superintending architect of metropolitan buildings.

On April 7, 1907, application was made on behalf of the Rev. James Fleming and others, trustees of the United Kingdom Temperance and General Provident Institution, as the owners of the messuages and premises situate and being 153, 155, 157, 159, 161, 163, and 165, Euston Road, in the borough of St. Pancras, in the county of London, in pursuance of s. 22 of the London Building Act, 1894, to the superintending architect of metropolitan buildings to define the general line of buildings in respect of the above-mentioned messuages and premises, the same lying between Mabledon Place and Duke's Road on the south side of Euston Road.

Along that side of the road between the east side of Duke's Road and the west side of Mabledon Place, a distance of 420 feet, stood a row of old houses erected before the year 1862. In front of all these old houses, which are hereinafter called the main buildings, there were, at the time when they were erected,

(1) [1909] 1 K. B. 116.

forecourts or open spaces between the fronts of the main buildings themselves and the pavement line of the highway.

At the date of the application to the superintending architect there had been built upon the forecourts or open spaces in front of most of the main buildings and projecting out from the main buildings up to the pavement line a number of shops, namely, one shop of two storeys numbered 119 and 121, Euston Road, and several shops of one storey numbered, in odd numbers, 123 to 135, 141 to 153, 167, and 169, Euston Road. All these shops were substantially constructed and of many years' standing.

Euston Road was constructed under certain local Acts of Parliament referred to in and consolidated by the statute 7 Geo. 4, c. cxlii. The line of main buildings on the south side between Duke's Road and Mabledon Place complied with the provisions of s. 140 of that statute. That section was repealed by the Metropolis Management Amendment Act, 1862, and replaced by s. 75 of that Act. (1)

With regard to the shops erected upon the forecourts or open spaces in front of the main buildings, as to those numbered 133, 135, 145, 147, 149, and 151, containing an aggregate frontage of 110 feet, the consent of the Metropolitan Board of Works had been duly applied for and obtained in accordance with s. 75 of the Metropolis Management Amendment Act, 1862, the consent having been obtained at various dates between the years 1864 and 1880. Consent was given in respect of each of these shops on condition that it should be of one storey and that it should not be at any time or in any manner altered or raised without the consent of the Metropolitan Board of Works, and in respect of the shops numbered 133, 135, 145, and 151 on the further condition that certain land should be surrendered.

Application for consent to the erection of a temporary structure upon the forecourt or open space in front of the main building numbered 139 had been made to the Metropolitan Board of Works and refused. The shop numbered 153 was built before any application was made for consent; consent was subsequently applied for and refused on April 28, 1876.

(1) The material enactments are set out in a note at the end of the report of the case in the Court below.

C. A 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

As to the shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143, 167, and 169 there was no evidence as to how or when they had been erected; the only evidence as to these was that the chief clerk of the superintending architect's department, who had been employed for forty years in that department under the Metropolitan Board of Works and under the London County Council consecutively, had searched through all the records in the possession of the London County Council and had been unable to find any record of a consent given to the erection of any of those shops. The same witness had searched for and found records of the consents and refusals mentioned above. The shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143, 153, 167, and 169 contained an aggregate frontage of 171 feet. The remaining portion of the frontage, that is to say, 139 feet, was vacant.

The superintending architect duly gave notice to all persons interested, including the Metropolitan Railway Company as freeholders of 123, 125, 127, and 129, Euston Road, to attend the inquiry held by him for the purpose of defining the general line of buildings at the said portion of Euston Road, and the persons interested attended the inquiry and were heard by the superintending architect, who made his certificate on May 10, 1907, and thereby certified that the fronts of the main buildings numbered in odd numbers 125 to 151 and 153 to 169 inclusive, together with the northern flank of No. 1, Mabledon Place and the northern main flank of No. 17, Duke's Road, formed the general line of buildings on the south side of Euston Road between Duke's Road and Mabledon Place.

The certificate of the superintending architect being duly made and issued, notice thereof was duly served on the Metropolitan Borough Council of St. Pancras and on all interested persons, whereupon the Metropolitan Railway Company and the Rev. James Fleming and others (hereinafter called the respondents) did on May 23, 1907, duly serve notice of appeal against the said certificate to the tribunal of appeal under s. 25 of the London Building Act, 1894, and in pursuance of the regulations made by the tribunal of appeal under s. 184 of the Act.

The appeals were heard together by consent of the parties on June 11, 1907.

No evidence was given of any prosecutions or intended prosecutions in respect of any of the shops erected as aforesaid on the forecourts or open spaces in front of the main buildings or of any attempt to obtain the removal of the said shops or any of them, and no request was made to adjourn the hearing of the appeal pending any prosecution or attempt to procure the removal of the shops. There was no evidence as to whether or not any of them were built upon old foundations.

The respondents contended that the duty of the superintending architect and of the tribunal of appeal was to define what was in fact the general line of buildings; that as the said shops were in existence at the date of the superintending architect's certificate and of the hearing of the appeal before the tribunal of appeal, that tribunal were entitled to take their position into account in defining the present line of buildings, and that the circumstances under which they came into existence, and the facts that some of them were erected without consent and that others were consented to upon conditions, might be disregarded, and did not prevent the superintending architect or the tribunal of appeal from taking into account the position of the shops in defining the general building line; and, further, that those which had been erected by consent, and those in respect of which there was no evidence as to whether they were erected with or without consent, must be presumed to be lawfully in existence.

The London County Council contended that the general line of buildings between Duke's Road and Mabledon Place was correctly determined by the superintending architect to be the line of fronts of the main buildings hereinbefore referred to, and that the superintending architect and the tribunal of appeal were entitled to and ought in law to consider the circumstances affecting the erection of the shops hereinbefore described, and, if the circumstances shewed that they were either unlawful, as having been erected without the consent or notwithstanding the refusal of the Metropolitan Board of Works, or lawful only as existing by the consent of the Metropolitan Board of Works under the conditions above set forth, the superintending architect

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

and the tribunal of appeal should disregard the existence of such structures in determining the general line of buildings. It was not contended that these shops were not buildings.

The tribunal of appeal allowed the appeal and varied the certificate of the superintending architect and determined that the general line of buildings was the frontage line of the shops erected as aforesaid upon the forecourts or open spaces in front of the main buildings.

In arriving at their decision the tribunal of appeal first took into account all the buildings which they found on the site, excluding only from consideration the temporary structure numbered 139, and came to the conclusion above stated. They then considered the question excluding from consideration the shop numbered 153, in respect of which consent had been refused by the Metropolitan Board of Works, and which, it was contended, was unlawfully erected; and, so considering the question, they came to the same conclusion. The tribunal were in doubt as to whether they ought to exclude No. 153 from consideration, but its exclusion did not affect their decision. It was not contended that the shops numbered 133, 135, 145, 147, 149, and 151 were not lawfully erected, and, if and so far as it was necessary for their decision, the tribunal of appeal were of opinion that those structures and the shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143, 167, and 169 were lawfully in existence.

The London County Council, being dissatisfied with the determination of the tribunal of appeal as being erroneous in point of law, applied to the tribunal under s. 182 of the London Building Act, 1894, to state and sign a case for the opinion of the High Court, setting forth the facts and the grounds of the determination and order of the tribunal of appeal. A special case was accordingly stated in which the foregoing facts were set out.

The question for the Court was whether the tribunal of appeal had come to a right determination in point of law in the circumstances.

The Divisional Court answered this question in the affirmative. (1)

(1) [1909] 1 K. B. 116.

C. A. Russell, K.C., and *F. F. Daldy*, for the London County Council. It is clear that at the date of the passing of the Metropolis Management Amendment Act, 1862, the fronts of the old houses constituted a general line of buildings on that portion of the south side of the Euston Road which lay between Mabledon Place and Duke's Road. Having regard to the provisions of the Act of 1862, that line still remains the general line of buildings, and the facts that consents were in some cases given by the Metropolitan Board of Works to the erection of shops on the forecourts in front of some of the buildings, and that shops were so erected, and that in other cases shops were erected apparently without the consent of the board, could not have the effect of altering the general line of buildings. The scope of the legislation on the subject was that, as soon as a general line of buildings had come into existence in a street, the question whether the intermediate space between that line and the highway should be built upon, and, if so, under what conditions, should be under the control of the Metropolitan Board of Works. By s. 140 of the statute 7 Geo. 4, c. cxlii., which consolidated certain pre-existing statutes with regard to the Euston Road, it was made unlawful to build on a new foundation within fifty feet from the side of the highway. There was no relaxation of that rule until the Act of 1862 was passed. By the Metropolis Management Act, 1855, s. 143, it was provided that no building should, without the consent of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street, in case the distance of such line of buildings from the highway did not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounted to or exceeded thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, but the Act of George IV. was not affected by the Act of 1855. Those enactments were repealed by the Metropolis Management Amendment Act, 1862, s. 75, which enacted that no building, structure, or erection should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street in case the distance of the line of buildings from the highway did not exceed fifty feet, or within fifty

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

feet of the highway when the distance of the line of buildings therefrom amounted to or exceeded fifty feet. By this section the line of buildings was to be decided by the superintending architect to the Metropolitan Board of Works, but it was clearly established by the decisions on the section that the line of buildings was to be looked upon, not as brought into existence by the certificate of the architect, but as already existing, his function being to determine what it was: see *Wandsworth Board of Works* v. *Hall*. (1) It is found in the present case in terms that, before the consent to the erection of shops was given, there was an already existing line of buildings in the street. The whole transaction with regard to consent implies that the erection consented to is beyond the line of buildings, and therefore cannot be regarded as having the effect of altering that line. By s. 76 of the Act of 1862 it was provided that the Metropolitan Board of Works might annex any condition to a consent given by them under s. 75. To give to the board the power of saying that a building shall only be erected beyond the general building line upon a condition which may, as in the present case, be that the building so erected shall never be altered or raised without the consent of the board is quite inconsistent with the idea that, by reason of such consents being given, and the erection of buildings by virtue of them, the original line of buildings may be altered. It is clear from the special case that the appeal tribunal have not in this case excluded from consideration, in determining the general line of buildings, the shops that were erected with the consent of the board subject to this condition. The conditions which may be imposed under s. 76 of the Act of 1862 are rendered nugatory if the appeal tribunal are right in the view which they have taken. Assuming that such conditions are binding upon the owners of the premises in respect of which they were imposed, then the unjust and absurd result would follow from the contention for the respondents, that the consequence of consent being given in certain cases subject to such conditions would be that all the other owners in the street would become free unconditionally to build beyond the original line of buildings to any height, whereas those who had obtained the

(1) (1868) L. R. 4 C. P. 85.

consents which led to this consequence remained bound by the condition which prevented them from building on their forecourts beyond the height of one storey. It is submitted that, looking at the provisions of the Act of 1862 without reference to the provisions of the London Building Act, 1894, the contention for the respondents is untenable. But it is necessary to consider the matter in the light of the provisions of s. 27 of the London Building Act, 1894, and s. 216 of the same Act, which deals with the question what the effect is to be of consents given under the Act of 1862. The fair meaning of the latter section is that, quoad any question of this kind raised in future, the effect of a consent given to a building being erected beyond the line of buildings under s. 75 shall be the same as that indicated by s. 27 with regard to similar consents given by the council. The effect of s. 27 is that any consent by the council to the erection of a building beyond the general line of buildings, or the erection of such building, shall not be deemed to affect the general line of buildings as existing at the time of such consent; so that, if the buildings in the Euston Road which were erected by consent of the Metropolitan Board of Works beyond the general line of buildings had been erected by consent of the London County Council under the London Building Act, 1894, their erection clearly could not have altered the original line of buildings. Sect. 27 is really a declaratory section, and s. 216 gives effect to it as such.

Macmorran, K.C. (*A. A. Bethune* with him), for the Metropolitan Railway Company. The function of the superintending architect, and the tribunal of appeal constituted under the London Building Act, 1894, in cases of this kind is to decide what actually, and as a physical fact, is the general line of buildings in the street at the time when they are called upon to determine the question. The "general line of buildings" cannot mean some imaginary or theoretical line to be determined with reference to the state of things which existed at some bygone period, possibly long past, and to such questions as whether consent was or was not given by the Board of Works to the erection of buildings, and, if so, on what terms, questions which the superintending architect or the tribunal of appeal might not

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

have the means of determining. If buildings were unlawfully erected without the consent of the board, proceedings could have been taken by the board to procure their demolition, and then, of course, they would not have affected the line of buildings. The Metropolitan Board of Works could, if they thought fit, preserve the original building line by getting buildings erected beyond it, without their consent, pulled down, and by restricting the number of consents given by them. It is not suggested that the erection of two or three buildings beyond the line of buildings with the consent of the Metropolitan Board of Works, or without their consent, would alter the original building line, but the erection of many such buildings might do so. What is the general line of buildings at any time must be a question of fact. It cannot be that it remains the same for ever as an imaginary line, whatever alterations have been in fact made, and however many buildings are erected beyond the original line. If the owner of all the houses on one side of the street pulled them down, the line of buildings would cease to exist, and, subject to any statutory provision as to not building within a certain distance of the highway, and such like, the owner could build houses on his land up to the edge of the highway. Suppose that nearly all the buildings in a street had been altered so as to project beyond what had once been the line of buildings, either by reason of consents given by the Metropolitan Board of Works, or by reason of houses erected without consent having been allowed to remain by the board, would it be reasonable to say that the general line of buildings continued to be that which clearly in point of fact it was not? Sect. 27 of the London Building Act, 1894, must be construed according to the general rule of construction prospectively, as applying only to consents given by the London County Council under that Act. Sect. 216 of that Act is a saving clause, and cannot reasonably be construed as applying the provisions of s. 27 retrospectively to consents given by the Metropolitan Board of Works under the Act of 1862. [He cited *Scott* v. *Carritt*. (1)]

Simon, K.C. (*Cecil Walsh* with him), for the respondents Fleming and others. It is necessary first to consider what the law

(1) (1900) 82 L. T. 67.

was, and how matters stood, under the Act of 1862, immediately before the passing of the London Building Act, 1894, and then, secondly, to consider the effect of ss. 27 and 216 of the latter Act. It should be observed that the Acts do not speak of a "building line," which would prima facie mean a line drawn on the ground beyond which it was not lawful to build, but of a "general line of buildings." The Metropolis Management Act, 1855, in s. 143, for which s. 75 of the Act of 1862 was substituted, spoke of a "regular line of buildings." These terms indicate a physical fact, which exists as long as the buildings which provide the general or regular line exist substantially in statu quo, but which may be varied by the erection or pulling down of buildings, and which disappears altogether if all the buildings are pulled down. This construction of the term "general line of buildings" involves no mischief so far as the public are concerned, because the authority charged with the protection of the public interest in these matters could always prevent the alteration of the original line of buildings by the manner in which they exercised their powers. They might get a magistrate to order the demolition of any buildings unlawfully erected beyond that line without their consent, and they might refuse their consent to the erection of such or so many buildings as might have the effect of altering the general line of buildings. On the other hand, if the original line of buildings must be conceived of as unalterable, and continuing to exist, however completely it has ceased to be in fact the general line of buildings in the street, great hardship may be caused to individual owners, whom the board would not allow to build beyond that original line, though it had in fact ceased to be the general line of buildings in the street.

It is submitted that, notwithstanding the insertion of s. 27 in the London Building Act, 1894, the question for the superintending architect and the tribunal of appeal still is, What is, as a physical fact, the general line of buildings in the street at the time when they have to decide the question? A reasonable effect would be given to s. 27 of the Act of 1894 if it were held to mean that the mere fact of consent being given by the council to the erection of a building or buildings beyond the general line of buildings,

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

and the erection of such a building or buildings accordingly, should not per se operate to alter the line of buildings. If, as contended, it means more than that, namely, that, however many buildings are erected beyond the original line of buildings with the consent of the council, the original line of buildings shall not be altered, then it is submitted that s. 27 itself in terms only applies to consents given by the council under the Act of 1894: and it would be giving to s. 216 a most forced and extraordinary construction to treat that section (which is a general section in the nature of a saving clause, applying not only to consents, but also to by-laws, regulations, orders, conditions, and notices given, imposed, or issued under any Act repealed by the Act of 1894) as a clause altering retrospectively what, on the hypothesis that under the Act of 1862 the general line of buildings could be and had been altered, was the effect before the passing of the Act of 1894 of what had taken place under the Act of 1862. By the terms of s. 216 it only provides that the "consents" and other matters enumerated shall "so far as applicable for the purposes of this Act" be of the same validity and effect as if they had been given, imposed, or issued under the Act. It is not sought in this case to treat the consents given by the Metropolitan Board of Works as applicable for the purposes of the Act of 1894. It is not suggested that any alteration of the buildings or the line of buildings in the part of Euston Road in question has taken place since the passing of the Act of 1894. The question here is as to the effect of the consents given by the Metropolitan Board of Works, and what was done under them, before the Act of 1894 was passed. Sect. 215, sub-s. 2 (*a*) and (*b*), favours the contention of the respondents. If, by reason of the erection of a sufficient number of buildings beyond the original line of buildings with the consent of the Metropolitan Board of Works, there was an alteration of the original line, then no consent would be needed for building up to the new line. It is a very reasonable inference in this case that, in the cases where shops were erected on the forecourts apparently without the consent of the board, the erection was subsequent to an alteration of the line of buildings by reason of those which were erected with such consent. The condition

annexed to the consent given, namely, that the shops should not be added to without the consent of the Board of Works, could only be regarded as holding good so long as the original line of buildings could be considered as continuing to exist. When that became altered, as it is contended that it did, every owner in the street would be entitled to build up to the new line. [He also cited *Spackman* v. *Plumstead Board of Works.* (1)]

C. A. Russell, K.C., in reply. The latest of the consents given by the Metropolitan Board of Works was in 1880. The granting of the consent was evidence that at that date the original line of buildings continued to exist. No new building appears to have been erected since then.

Cur. adv. vult.

May 14. The following judgments were read :—

FLETCHER MOULTON L.J. The point in dispute in this case raises the question of the true interpretation of certain provisions in the London Building Act, 1894, as applied to the street and houses referred to in the special case.

This Act was intended to take the place of a long series of Building Acts relating to the metropolis, all of which it repealed, and also of provisions to be found in Metropolis Management Acts and others relating to building matters. It appears from the preamble, as well as from the nature of the enactments contained in it, that it was intended not only to combine in one Act provisions which had to be sought for in many different statutes, but also to clear up doubts as to the existing law, and to make such modifications therein as would better secure the construction and maintenance of streets and buildings in a satisfactory manner. Inasmuch, therefore, as it was intended to a large extent, but not exclusively, to continue the existing law, although taking its place, it is necessary, before proceeding to apply any provision contained in it to buildings erected before 1894, to ascertain how it treats the corresponding provisions that it repeals, and to what extent it keeps unchanged or modifies the effect of acts done under and in pursuance of those

(1) (1885) 10 App. Cas. 229.

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

Fletcher Moulton L.J.

provisions of the earlier Acts—in other words, to what extent it is retrospective.

The important clause for this purpose is s. 216, which reads as follows: "All by-laws regulations orders consents conditions and notices duly made given imposed or issued under any Act hereby repealed shall so far as applicable for the purposes of this Act be of the same validity and effect as if they had been made given imposed or issued under this Act. And all such by-laws and regulations shall remain in force until the same shall be revoked altered or varied by by-laws duly made under the provisions of this Act."

This is a remarkable clause, because, instead of providing that the consents therein referred to (which is the only matter with which we have here to deal) which had been given under some previous Act should be of the same validity and effect as they previously had been (in other words, instead of being a continuation clause preserving things in statu quo), it provides that they shall have a presumably different effect, namely, that they shall be of the same validity and effect as if they had been originally given under the new Act. It is true that this is limited by the words "so far as applicable for the purposes of this Act," but in the present case these words appear to me to occasion no difficulty. It follows, therefore, that we have here an enacting clause giving to consents under previous Acts the same effect as if they had been given under the Act of 1894, and thus making the legislation as to their legal effect retrospective.

The advantage of such provisions where they can be enacted without substantial injustice is obvious. One of the most serious disadvantages of legislation by a succession of statutes, such as we have here, is that, in spite of attempts to simplify and consolidate the legislation from time to time by Acts which repeal and take the place of the previous Acts, there must generally remain great difficulties in the way of ascertaining the rights of parties so long as they are dependent on the effect of acts done while the earlier Acts were in force. If the later legislation preserves the effect of these Acts, the earlier statutes have to be examined as though they were in force (although they have ceased to exist) in order to ascertain the rights of parties, and

this causes endless confusion and dispute. Here the Legislature has felt that it could to a very great degree clear all this away by providing that these consents, &c., shall be for all purposes viewed as given under the new legislation, and the world is spared the labour of ascertaining what under a past state of things would have been the effect which must have been given to them. This it effects by s. 216, which leaves us in the position of having to consider only the effect of consents given under the existing legislation.

It was contended on behalf of the respondents that the effect of s. 216 is qualified and controlled by s. 215. In my opinion this is not the case. Sect. 215 is the usual saving clause inserted in Acts which repeal previous legislation. It provides in respect of the repealed Acts that their "repeal shall not affect: (*a*) the past operation of any enactment hereby repealed, nor anything duly done or suffered under any enactment hereby repealed; or (*b*) any right privilege obligation or liability acquired accrued or incurred under or in accordance with any enactment hereby repealed." It is clear that this does not mean that all existing rights shall remain unchanged as they were at the date of the passing of the Act, for this would be contradicted by numerous sections of the Act. It means solely that the mere repeal of an Act under which any such right is acquired shall not of itself take away that right. It does not say "Nothing in this Act shall affect such right," but only that the repealing section shall not do so. Consequently it does not purport to affect any enacting clause of the Act of 1894. It deals with the effect of the repealing clause only. Now s. 216 is an enacting clause, and therefore full effect must be given to it, and it is in nowise affected by the existence of s. 215.

Starting from this general principle with regard to the effect of consents under previous Acts, I turn to the section directly relating to the matter in hand. By s. 22 it is provided as follows: "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

Fletcher Moulton L.J.

fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate, such certificate to be issued within one month from the date of the application therefor"; and by s. 25 an appeal is given to the tribunal of appeal from the certificate of the superintending architect.

In the present case the respondents appealed from such a certificate, and the tribunal of appeal decided that the building line was in accordance with their contention. The decision of this tribunal is conclusive as to fact, and therefore we cannot interfere with it unless it can be shewn that the decision depends upon an error in law. But the appellants contend that the special case which has been duly stated by the tribunal of appeal for the opinion of the Court shews that the decision of the tribunal of appeal is based on an error of law, namely, that they have acted in direct contravention of the provisions of s. 27, which provides as follows: "The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent." In other words, they say that it appears from the special case that the tribunal of appeal have taken into account as affecting the general line of buildings certain buildings which this section, taken in connection with s. 216, directs shall not be so taken into account.

I am of opinion that this contention is right. Reading into s. 27 the relevant provisions of s. 216, I find that it provides that buildings erected under such consents, whether obtained under the present Act or any of the repealed Acts, shall not be deemed to affect or alter the general line of buildings as then existing at the time of such consents. Any tribunal, therefore, which has to determine the general line of buildings must exclude such buildings from its consideration—must treat them for that purpose as non-existing. The tribunal of appeal state

that they took into account, in determining the general line of buildings, Nos. 133, 135, 145, 147, 149, and 151, which had admittedly been erected under and in pursuance of such consents. This was not in conformity with s. 27 and s. 216, and, seeing that these erections formed so substantial a portion of the buildings from which they deduced the general line of buildings, it is not competent for us to say that the inclusion of these erections as part of the buildings, the general line of which they had to determine, could not have made any difference in their decision. The matter must therefore go back to them to determine in accordance with the law.

The main contention of the respondents was based on the fact that the specific provisions of s. 27 appear for the first time in the Act of 1894. There is no corresponding section in any of the repealed Acts. They argue from this fact that buildings erected under consents obtained under the repealed Acts were under those Acts entitled to be taken into consideration in fixing the general line of buildings, and therefore the general line of buildings in this street immediately before the passing of the Act of 1894 would have been determined by taking into consideration the whole of the material which the tribunal of appeal has here taken into account, and therefore would have been presumably that which they have fixed. This being so, they go on to contend that, if the general line of buildings immediately before the passing of the Act of 1894 would have been that which the tribunal of appeal have now fixed, it cannot have changed since, because no buildings have been erected or removed.

I find myself unable to accept any of the steps of this argument. In the first place I am clearly of opinion that the tribunal of appeal has no authority to decide what was the general line of the buildings at any past date, more especially at a date before it came into existence, which was at the passing of the Act of 1894. It has only to decide the question brought before it on appeal, namely, the general line of buildings at the date of the application to the architect to fix it under s. 22, and it must decide this from the existing state of things, due regard being had to the provisions of s. 27. Further, it does

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

Fletcher Moulton L.J.

not follow that the general line of buildings at the date of the passing of the Act of 1894 might not in certain cases be altered by that Act. There is no provision in the Act of 1894 which preserves all existing rights, and, as I have said, in many cases rights were substantially altered by the Act, no doubt on public grounds. But the basis of the whole contention is the assumption that the erection of buildings under consents given under previous Acts affected the general line of buildings because such Acts contained no section corresponding to s. 27. I do not agree with this contention. Sect. 27, in my opinion, is inserted to remove doubts and to make the effect of consents perfectly clear in this respect for the future. But I do not think that it altered the law. A consent under the Act of 1862, s. 75, permitted the owner to erect a building "beyond the general line of buildings" in the street, and, in my opinion, it left the general line of buildings unchanged. It neither brought forward nor helped to bring forward the general line of buildings, because it was expressly a permitted exception. It remained as it was originally built, a projection beyond that general line, and the general line ran in its rear just where it ran previously to the exceptional privilege being granted. This appears to me to be the natural interpretation of the earlier legislation. I am confirmed in this view by a consideration of the consequences to which the opposite view must inevitably and normally lead. Suppose a street such as the one in question, with gardens and forecourts in front of the houses. Permission is asked by one of the owners to advance a one-storey shop. The authority may consider that such low outbuildings will not seriously interfere with the advantages to be derived by the public from the wide space between the houses, and may accordingly grant the permission, restricting the permission to a one-storey building. The permission given to one will presumably not be refused to others in the same row, inasmuch as the public authority will treat all impartially. According to the contention of the respondents, the rest of the owners have only to wait until a sufficient proportion have obtained and used these permissions (all of which are alike restricted to one-storey buildings) before becoming entitled to erect buildings of whatever height they like without any consent,

because these permitted one-storey buildings have advanced the general line of buildings. I have often said that it is very unsafe to allow the consequences of a suggested interpretation in exceptional cases to influence the mind in the construction of the provisions of a statute. But it is legitimate to consider the inevitable or probable consequences of a suggested interpretation in a normal case, and it seems to me that we cannot suppose—unless compelled so to do by the language of the statute—that the Legislature would permit such consequences necessarily to flow from its provisions. To my mind there is nothing in the language to compel us to give to the provisions such a meaning. The natural interpretation appears to me to be that the building to which consent is given is not to affect the general line of buildings because it is always to be regarded as an exceptional building. And this explains why the Legislature, after putting the question beyond doubt for the future by s. 27, saw no difficulty or injustice in making this provision as to the effect of a consent retrospective, as it did by the provisions of s. 216.

Alike therefore on the ground that these buildings ought not to have been taken into account previously to the Act of 1894, and that, whether this be so or not, they ought not to have been taken into account in a proceeding under the Act of 1894, I am of opinion that this appeal should be allowed.

FARWELL L.J. In April, 1907, application was made under the London Building Act, 1894, to the superintending architect of metropolitan buildings to define "the general line of buildings" in respect of part of the Euston Road, and the respondents to this appeal attended on the inquiry made by him in accordance with the Act. On May 10, 1907, the architect gave his certificate, which was taken before the tribunal of appeal and by them overruled. The question for this Court is whether the tribunal of appeal have misdirected themselves by holding that they could only look at the state of the buildings as they were at the date of the inquiry, or whether they ought to have taken into consideration the fact that the buildings erected in front of many of the houses (which I will call the projections) were so erected by

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY

Farwell L.J.

consent of the Metropolitan Board of Works "beyond the general line of buildings" under s. 75 of the Metropolis Management Amendment Act, 1862.

This is a question of law depending on the construction of the Acts referred to in the argument. All the consents in question were given between the years 1864 and 1880, and, in the case of all the projections, whether the actual consents have been produced or not, I am of opinion that the true presumption of law is that all were erected with the consent of the Metropolitan Board of Works on the principle "omnia rite esse acta præsumuntur." It was unlawful, under the Act of 7 George IV., to erect any building at all on the land occupied by the projection before 1862, and to erect any building without the consent after 1862. In my opinion, therefore, all necessary consents ought to be presumed to have been given. The one or two instances in which consent was refused and the two cases where projections were built of more than one storey may be disregarded as immaterial. It is clear that, when the first consent was asked, "the general line of buildings" was the line of the houses. The consent was and could, under the Act, only be to the erection of a projection in front of that line. There is nothing in the Act enabling the board to advance or alter the line; and it would be an extraordinary result if a public body, entrusted with the duty of preserving, not mere architectural uniformity, but sufficient areas of light and air for the general health and well-being, should by consenting to the erection of projections of one storey, and no more, in front of the line of buildings be held to have thereby consented to the alteration of the line of buildings so as to authorize the erection of seven or eight storey buildings. But this is the result of the respondents' contention. If it were so, the Board of Works was in this dilemma. The Act obviously intended the consent to be given in proper cases: if it was given to one owner and refused to his next door neighbour, the board would expose themselves to a charge of favouritism; but if they gave their consent to one-storey projections to all, they destroyed the area of light and air which by the restriction to one-storey projections they desired to preserve. This is, in my opinion, an impossible construction of the Act of 1862.

The present case arises under the Act of 1894, the preamble of which has been already read. That deals with this point in express terms by s. 27, and it is clear that, if the consents in question had been given under that Act, the buildings erected in pursuance thereof would be treated as non-existent for the purpose of ascertaining "the general line of buildings." But by s. 216 all consents given under the Act of 1862 "shall so far as applicable for the purposes of this Act" be of the same validity and effect as if given under the Act of 1894. This is not a saving but an enacting clause; and if the question to be asked is, what effect would these consents have under the Act of 1894, it is answered by s. 27. It is said that this is only "so far as" the consents are "applicable for the purposes of" the Act of 1894, but if the consents are not applicable under the Act of 1894 they are useless to the respondents, because, on the true construction of the Act of 1862, the buildings erected thereunder have no effect on the general line of buildings; if they are applicable, then s. 27 applies in express terms.

I am therefore unable to agree with the Divisional Court, and am of opinion that the case should go down to the tribunal of appeal again, unless the parties are willing to adopt the original decision of the architect without further resort to the tribunal of appeal.

SIR J. C. BIGHAM, PRESIDENT. The question in this case is whether the tribunal of appeal, when fixing the line of building in the part of the street mentioned, ought to have taken into consideration those shops which had been erected with the consent of the local authority, and subject to a condition that they should not exceed one storey in height. I make no distinction between those shops as to which the written consents were forthcoming and those as to which no consents could be found; the probability is that all the shops were erected in similar circumstances.

It is said by the appellants that the one-storey shops ought not to have been taken into consideration, and that regard should have been had only to the houses which stand behind the shops, and which are alleged to form the frontage line of the main

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

The President.

buildings. I think the answer to this contention is that s. 22 of the Act of 1894 requires the architect to ascertain the line of the buildings as it is, and not as it was; and that, if so, the substantially built shops along the line of the pavement must be considered when ascertaining the line of building in that part of the street. In what way is it said that these shops should drop out of consideration, and that the old houses behind them—invisible to persons walking on that side of the street—should alone be taken into consideration? First, reference is made to an old and long since repealed statute of George IV., by which it appears that if these shops had been erected while that statute was in operation they would have been deemed "common nuisances"; that is to say, their existence would have been unlawful. I think, however, that this statute may be dismissed from consideration. These shops were not built while it was in operation, nor was their erection ever in any sense unlawful.

Then reference is made to the Metropolis Management Act of 1855, which for the first time, as far as I know, speaks of a regular line of buildings in a street. By s. 143 of that Act it was enacted that no building should, without the consent in writing of the then existing Board of Works, be erected beyond the regular line of buildings in the street so as to bring the buildings within thirty feet of the highway. This Act of Parliament was also repealed when the statute of George IV. was repealed, but it was practically re-enacted by the repealing statute, namely, the Metropolis Management Amendment Act of 1862, with the unimportant difference that fifty feet was substituted for thirty feet. Sect. 75 of the last-named Act, however, provided that the general line of building should be decided by the architect for the time being of the Board of Works. This provision placed the building owner in a safer position than he had previously occupied, because, before the architect had this power, the building owner put up his building at his own risk of its turning out to be beyond the regular line of buildings. Sect. 75 further provided that, if a building which violated the provisions of the statute were erected, either without consent or contrary to the conditions of the consent, proceedings might be taken before justices to procure its

demolition. It was while this statute was in operation that the shops in question in the case were built; and it is said that their erection did not in any way affect the general line of building in the street. It is argued, as I understand, that the very fact that the consent is given to build beyond the general line presupposes the continuing existence of the then line. I think this is a fallacy, for if it be true, then, although the board might have given permission to build a whole row of houses in front of the old houses, and of the same height, leaving only one house space vacant, the owner of the one space could not have claimed, nor could the architect have found, that the line had been altered by the new state of things. It is said in answer to this that the board would no doubt act reasonably, and would give to the owner of the vacant space a consent identical with the other consents. This, however, is speculation, and I decline to consider it. The owner of the vacant space would, in my opinion, have a right in such circumstances to ask to have the general line of building fixed in accordance with the new state of things, so that he might build along that line without risk of being interfered with. It may be said that, if this view is to prevail, it would have the effect of nullifying the conditions upon which the consents were granted, and so I think it would. But the board must be taken to have known this. One consent would not have affected the general line of building, but twenty might very well do so; and, if the board wanted to preserve the old line of building, it was their business to see that they did not imperil it, or destroy it, by giving numerous consents to erections inconsistent with it. The conditions attached to them do not, like the magic cap, render the shops invisible; and, if the shops in fact constitute a general line of building, I think the architect cannot be allowed to shut his eyes to their existence. It must be remembered that a line of buildings is not an immutable line; it is a line which shifts from time to time as the position of the buildings which form it shifts. If I am right in this view, the frontagers along the part of the Euston Road now in question acquired very valuable rights by reason of the altered condition of things.

But then I understand the appellants to contend that, even

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

The President.

if this is so, the position of the respondents has been somehow affected to their detriment by subsequent legislation. There came the London Building Act of 1894, which is now in existence; that Act repealed the section of the Act of 1862 under which the consents had been granted, and during the operation of which the shops had been erected. But by s. 22 it practically re-enacted s. 75 of the Act of 1862, and by s. 27 it provided that neither the consent of the London County Council (which had taken the place of the old board) to the erection of buildings beyond the general line of buildings nor the erection of the same should be deemed to affect or alter the general line of buildings as existing at the time of such consent. Stopping for a moment at this point, I wish to say that the insertion of such a provision looks as if the framers of the Act had thought or feared that the giving of consents under the previous Act might have had the effect now contended for by the respondents. Then the appellants pray in aid a section (s. 216) found at the end of the Act. This is a section preserving the operation of old by-laws and regulations, and that is its main object. But from it there can be picked out the following words:—"All consents and conditions given or imposed under any Act hereby repealed shall so far as applicable for the purposes of this Act be of the same validity and effect as if they had been given or imposed under this Act." It is said that these words are not words merely saving the past operation of the consents, but are enacting words which bring the old consents within the meaning of s. 27 of the new Act, and therefore prevent the shops from altering or affecting the old line of building as it existed in and before 1862. This means that the valuable rights which had already been acquired, if my view of the effect of what was done under the old Act is correct, have been destroyed. I do not believe that the Act intended to effect such an injustice. If a statute is intended to take away private rights, one expects to find simple and plain words for that purpose, and not to be left to spell out such a result by piecing together bits of remote provisions in the Act which may apparently lead to the conclusion contended for.

For these reasons, and for reasons to be found in the judgments

of the Lord Chief Justice and Walton J. in the Court below, I think this appeal should be dismissed.

C. A. 1909

LONDON COUNTY COUNCIL v. METROPOLITAN RAILWAY.

Appeal allowed.

Solicitor for London County Council: *Edward Tanner.*

Solicitor for Metropolitan Railway Company: *C. de W. Kitcat.*

Solicitors for the Rev. James Fleming and others: *Francis Howse & Eve.*

E. L.

[IN THE COURT OF APPEAL]

C. A. 1909 *May* 21.

MASON *v.* GRIGG.

Practice—Costs—Taxation—Appearance by Defendant in person—Subsequent Employment of a Solicitor—Failure to get Solicitor's Name placed on the Record—Irregularity.

A defendant, who had appeared in an action in person, subsequently employed a solicitor to conduct his defence, but failed to give notice thereof at the Central Office, and consequently no solicitor appeared on the record as acting for the defendant. The plaintiff's solicitors were, however, aware that the defendant's solicitor was acting for the defendant, and had dealt with him as the defendant's solicitor in the action. The action being subsequently dismissed with costs for want of prosecution:—

Held that, though the failure to get the defendant's solicitor's name placed on the record was an irregularity, it ought not, under the circumstances, to be treated as fatal to the defendant's right to recover his solicitor's charges.

APPEAL from an order of Bucknill J. at chambers refusing to direct a review of taxation of the defendant's costs in an action.

The defendant had entered an appearance in person in the action, but subsequently employed a solicitor to conduct his defence. No notice of the defendant's being represented by a solicitor was filed at the Central Office, and consequently no solicitor appeared on the record as acting for the defendant. The plaintiff's solicitors were, however, aware that the defendant's solicitor was acting for the defendant in the action, as he represented the defendant on an application under Order XIV. at

C. A. 1909

MASON v. GRIGG.

chambers, and they had served notices and documents upon him as the defendant's solicitor in the action. The action was ultimately dismissed with costs for want of prosecution, and a bill of the defendant's costs was carried in for taxation. The Master allowed the defendant some out-of-pocket expenses, but refused to allow any of the defendant's solicitor's charges on the ground that no solicitor appeared on the record as representing the defendant at the time when those charges were incurred. On appeal to Bucknill J. at chambers he refused to direct a review of taxation.

G. Wightman Powers, for the defendant. There is no rule which provides in terms for a case like the present. It may be that the usual practice is in such a case to give notice of the employment of a solicitor at the Central Office, as stated in the Annual Practice for 1909, p. 41; but, where the plaintiff's solicitors, as in the present case, were well aware that the solicitor was acting for the defendant, and dealt with him as the defendant's solicitor in the action, it would not be just to deprive the defendant of his right to recover his solicitor's charges on a technical ground of this kind: see *Norris* v. *Bailey*. (1)

McCardie, for the plaintiff. The practice in such a case as this is stated in the Annual Practice for 1909 at p. 41 as follows: "Where a party in person engages a solicitor to continue the conduct or defence of an action (O. 67, r. 7), a notice to that effect must be left at the Central Office, and in Chancery actions, in chambers also, and must be served in the same manner as notices to change solicitor." It has never been the practice on taxation to allow charges of a solicitor who was not on the record when the charges were incurred. There are strong reasons why no relaxation of this rule should be allowed. A litigant might employ first one and then another solicitor, and there might be great difficulty in ascertaining who was the solicitor entitled to represent him at various stages of the action.

[FARWELL L.J. Where the opposite party has had no notice of the employment of a solicitor, and may have supposed that he was only running the risk of having to pay some small

(1) (1893) 62 L. J. (Q.B.) 338.

out-of-pocket expenses, there may perhaps be a reason for adhering strictly to the usual practice, but here the plaintiff's solicitors were perfectly well aware that the defendant's solicitor was representing him in the action.]

G. Wightman Powers, for the defendant, was not called upon to reply.

FLETCHER MOULTON L.J. I think that the Master was wrong in refusing to tax these costs. The proper procedure, where a defendant, who has appeared in person, employs a solicitor after appearance, is no doubt to put that solicitor's name upon the record. Not to have done so is an irregularity, which might under certain circumstances affect the right to recover the solicitor's charges, but it is not necessarily fatal to that right. Where, as in the present case, the opposite party has had full notice that the solicitor was acting for his opponent, and has recognized his position by serving notices upon him as solicitor for that opponent, it would, I think, be contrary to all justice to allow such an irregularity to be fatal to the right to costs.

FARWELL L.J. I am of the same opinion. I have no doubt that the practice is correctly stated at p. 41 of the Annual Practice for 1909. This is, however, a mere rule of practice, which is not absolutely binding on the Court in the same way as a substantive rule of law, but may be set aside in a proper case where natural justice requires it. Here the defendant's solicitor has done work in connection with the action, dealing with the solicitors for the opposite party in the ordinary way, but it appears that through a slip the name of the defendant's solicitor was not put upon the record. The Master has for that reason deprived the defendant of all the costs incurred by him through the employment of a solicitor. This is a wholly different case from one in which the opposite party did not know of the employment of the solicitor by his opponent, as appears from what was said by Collins J. in *Norris* v. *Bailey*. (1) He said in that case: "The only principle suggested is that applicable to the case of a litigant who conducts his litigation in person.

(1) 62 L. J. (Q.B.) 338.

C. A. 1909

MASON v. GRIGG.

Farwell L.J.

In such a case the principle that he should be entitled to nothing further than small out-of-pocket expenses is clearly right because the other side deal with him in that way and upon that footing." I apply those observations to the present case by pointing out that here the other side did not deal with the defendant as conducting his defence to the action in person, but dealt with the solicitor on the footing that he was acting for the defendant in the matter. I think that the Master should be directed to tax this bill.

Appeal allowed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Senior & Furbank, Richmond.*

Solicitor for defendant: *H. Vaughan Whitehead.*

E. L.

C. A. 1909 *April* 1.

[IN THE COURT OF APPEAL.]

PROVINCIAL BILL POSTING COMPANY *v.* LOW MOOR IRON COMPANY.

Landlord and Tenant—Distress—Fixtures—Advertisement Hoardings—Right to Distrain.

By an agreement in writing the defendants agreed to let and the plaintiffs to take the exclusive right of putting up advertisement hoardings and posting bills thereon upon specified land of the defendants for seven years, the plaintiffs paying the defendants a fixed annual sum, payable quarterly; rates and taxes to be paid by "the tenants." The plaintiffs erected hoardings, which were affixed in a very substantial manner to the land, and exhibited advertisements upon them. The plaintiffs fell into arrear in their payments under the agreement, and the defendants levied a distress upon the hoardings and ultimately carried them away and sold them. The plaintiffs brought an action to recover damages for wrongful distress, and the defendants counterclaimed for the amount of the arrears due under the agreement:—

Held that, even assuming the agreement created the relation of landlord and tenant between the parties, the advertisement hoardings, although removable by the plaintiffs at the end of the tenancy, were

fixtures and not mere chattels, and were therefore not distrainable, and the plaintiffs were entitled to recover damages for the wrongful distress.

Darby v. *Harris*, (1841) 1 Q. B. 895, approved and followed.

Held, further, that, the plaintiff company having gone into liquidation, it would be inequitable to set off the damages recovered by the plaintiffs on the claim against the arrears recovered by the defendants on the counter-claim and to give judgment for the balance, and that separate judgments ought to be given on the claim and counter-claim respectively.

Semble, that the agreement did not constitute a demise creating a tenancy, but amounted only to a licence to enter on the land and do certain specified things upon it.

APPEAL of the plaintiffs from the decision of Bigham J. at the trial at Leeds without a jury.

The action was brought to recover damages for a wrongful distress on certain bill-posting hoardings which had been erected by the plaintiffs upon land of the defendants. In June, 1907, three agreements in writing, all in the same form, relating to different hoardings, had been entered into between the plaintiffs and defendants. By each agreement the defendants agreed to let and the plaintiffs agreed to take "the exclusive right of posting bills and exhibiting advertisements upon" certain land of the defendants specified in the agreement, "and of fixing hoardings and doing all that is usual and proper to utilize the premises for bill-posting and advertising purposes for the term of seven years"; the agreement then went on to provide for a yearly sum, payable quarterly, to be paid by the plaintiffs to the defendants, and further provided that "rates and taxes are to be paid by the tenants." The plaintiffs entered on the land and erected three very substantially constructed hoardings for use as advertisement stations; each front post was rammed from four to five feet into the ground, and was secured to a back post twelve feet behind by stays and struts, further stability being secured by a system of strong cross-pieces. Early in January, 1908, a sum of 15*l.* was due from the plaintiffs to the defendants under the agreements. On January 20 the plaintiff company passed a special resolution for a voluntary winding-up. On January 23 the defendants levied a distress upon the hoardings for the 15*l.* in arrear, and on January 28 the plaintiffs gave notice to the defendants that the distress was illegal. On February 4 the plaintiff company passed

C. A. 1909

PROVINCIAL BILL POSTING COMPANY v. LOW MOOR IRON COMPANY.

the necessary confirmatory resolution for a voluntary winding-up and appointed a liquidator. On February 6 the defendants gave the plaintiffs notice to determine the agreements under a power contained therein in the event of the payments to be made by the plaintiffs becoming one month in arrear, and on February 7 the plaintiffs gave the defendants notice of the liquidator's appointment. In March the hoardings, which had been seized and removed, were sold by the defendants. In the action the plaintiffs claimed damages for wrongful distress, alleging that the hoardings were fixtures and were not distrainable, and the defendants counterclaimed for 151*l.*, the arrears due under the agreement, less 68*l.*, the amount realized by the distress. Bigham J. held that the hoardings, being removable by the plaintiffs during or at the conclusion of the tenancy, were chattels and therefore liable to distress, and gave judgment for the defendants on the claim. The counter-claim was not gone into. The plaintiffs appealed.

T. P. Perks, for the plaintiffs. The distress was wrongful. First, the hoardings were not chattels; they were substantially affixed to the soil, not for a merely temporary purpose, and at the moment the distress was levied they were part of the freehold, although the plaintiffs, as tenants of the defendants, had the right to remove them during their tenancy; they were therefore fixtures and were not distrainable. *Holland* v. *Hodgson* (1), *Hobson* v. *Gorringe* (2), and *Reynolds* v. *Ashby* (3) shew authoritatively that when a chattel is affixed to the soil the tenant loses his property in it and retains only a right to sever it before the determination of the tenancy. Those cases are, no doubt, cases of mortgagor and mortgagee, but in *Crossley Brothers* v. *Lee* (4) the same principle was applied, and a gas engine which had been obtained by the tenant on the hire purchase system and had been affixed by him to the floor of the premises was held to be a fixture and therefore not distrainable.

[BUCKLEY L.J. *Darby* v. *Harris* (5) seems to be an authority for

(1) (1872) L. R. 7 C. P. 328.
(2) [1897] 1 Ch. 182.
(3) [1903] 1 K. B. 87; [1904] A. C. 466.
(4) [1908] 1 K. B. 86.
(5) 1 Q. B. 895.

the proposition that although a chattel affixed to land may be removable by the tenant at the end of the tenancy it is nevertheless a fixture and cannot be distrainable.]

Yes; that case is an exact authority and is in accordance with the more recent decisions. Secondly, the agreement between the plaintiffs and defendants did not amount to a demise, and no tenancy was thereby created; it merely amounted to a licence to the plaintiffs to erect and maintain hoardings on the defendants' land for a specified term. As to this *Wilson* v. *Tavener* (1), a decision of Joyce J., is precisely in point. [He also cited *Taylor* v. *Pendleton Overseers.* (2)]

Thirdly, assuming that the plaintiffs succeed on this appeal, judgment for damages should be entered for them on the claim, and judgment for the defendants for 151*l.*, which is admitted to be due, on the counter-claim. The case should not be treated as one of set-off and judgment given for the balance; if that were done, the defendants would in substance recover their whole claim and would be getting a benefit over the other creditors of the plaintiff company, and this would be inequitable. [He cited *Eberle's Hotels Co.* v. *Jonas.* (3)]

Richard Watson, for the defendants. The hoardings were chattels and not fixtures, and the learned judge at the trial was right in holding that they were liable to be distrained. Each case must be decided upon its own facts. The mere attachment of a chattel to a house or to the soil does not make it a fixture in such a sense as to prevent its being removable; that is the principle that was acted upon by the House of Lords in *Leigh* v. *Taylor* (4) and was followed by Bigham J. in the present case. Being severable at the end of the tenancy, the articles retained the nature of chattels. The mode in which the chattel is affixed is not the only, nor even the most important, element to be considered. *Hellawell* v. *Eastwood* (5), in which spinning mules affixed to the floor of a mill were held to be distrainable for rent, is still law and should be followed.

Secondly, this was a demise and not a mere licence. *Wilson*

(1) [1901] 1 Ch. 578.
(2) (1887) 19 Q. B. D. 288.
(3) (1887) 18 Q. B. D. 459.
(4) [1902] A. C. 157.
(5) (1851) 6 Ex. 295.

C. A. 1909

PROVINCIAL BILL POSTING COMPANY v. LOW MOOR IRON COMPANY.

v. *Tavener* (1) is distinguishable: in that case there was no fixed commencement or determination; here there is an annual rent reserved, payable quarterly, and a provision for payment of rates and taxes by the tenant.

Perks was not called upon to reply.

BUCKLEY L.J. The claim, which we have first to dispose of, is by the plaintiffs, whom for the moment I will assume to be tenants, against their landlords for an alleged wrongful distress; the question is whether the distress was wrongful or not. The distress was levied on certain bill-posting hoardings which had been erected by the plaintiffs on land belonging to the defendants. The first question is whether the hoardings were fixtures. It was proved that they were affixed to the soil in a very substantial manner. The hoardings were erected upon vertical posts driven into the ground to a depth of four feet, tied together with cross-pieces; at the back was a stay or strut which was held in position by another post let into the ground and was kept from moving by cross-pieces. As far as their physical construction was concerned they were clearly affixed to the soil. In my opinion they were tenants' fixtures, put up by the plaintiffs, who, as tenants, had certain rights against their landlords, the defendants. What is the law as to the right of a lessor to distrain on chattels which by their physical construction have been made part of the soil, but which are severable by the tenant during the continuation of the tenancy? I hold without hesitation in the present case that the hoardings were, by reason of their physical construction, so fixed as to have become part of the soil. But it is contended that, as they could be converted into chattels if the tenant chose to remove them during the continuance of the tenancy, they retained their chattel nature and were distrainable by the landlords. It was held in *Darby* v. *Harris* (2), as appears from the head-note, that "fixtures (as kitchen ranges, stoves, coppers and grates), which a tenant may sever from the freehold and take away during his term, are not therefore distrainable for rent. Those things only can be distrained for rent, which the landlord could afterwards restore in

(1) [1901] 1 Ch. 578. (2) 1 Q. B. 895.

the plight in which they were before the distress." And in the same case Wightman J. says in his judgment, "Whether the tenant might or might not remove the fixtures, is one question; whether or not the goods could be restored in the same condition, and were distrainable, is another." In the present case the chattels were so dealt with, by affixing them to the soil, that they became part of the soil, and although they were capable of becoming chattels again at the will of the tenant, they were at the date of the distress part of the soil and, on the authority of *Darby* v. *Harris* (1), were not distrainable.

So far I have assumed that the plaintiffs are tenants; but, secondly, it is said that the agreements between the plaintiffs and defendants do not amount to a demise of the ground upon which the hoardings were erected, but merely to a licence to enter on the ground for the purpose of their erection. What did the plaintiffs take under the agreements? They took the exclusive right of using the land and affixing the hoardings and using them for bill-posting purposes. I think that this amounted to nothing more than a licence to go upon the land and do the specified things upon it. The plaintiffs had no estate in any definite parcel of the land, nor had they the exclusive right to the occupation of any definite portion of it. No doubt the payment of rates and taxes by the plaintiffs is a material factor in the case; but this is a very peculiar class of case, and it does not follow that, by reason of the liability to payment of rates and taxes, the licence is converted into a demise. I think the plaintiffs are not tenants and that upon both grounds the plaintiffs are right upon the claim and are entitled to damages for wrongful distress.

A point has been raised upon the counter-claim; it is a point of no substance. It is agreed that a sum of 151*l.* is due to the defendants for rent; there must on the counter-claim be judgment for the defendants for that amount. The costs of the action must be the plaintiffs', and the costs of the counter-claim the defendants'. Is this a case for the application of the principle of set-off? The defendants put in their distress on January 23, between the passing and the confirmation of a resolution for the voluntary winding up of the plaintiff company.

(1) 1 Q. B. 895.

C. A. 1909

PROVINCIAL BILL POSTING COMPANY v. LOW MOOR IRON COMPANY.

Buckley L.J.

The plaintiffs say, and with truth, that the defendants committed a tort and took away the plaintiffs' goods and got their money. But the distress, though wrongful, was in respect of rent, or a payment resembling rent, which was undoubtedly due and owing from the plaintiffs to the defendants. If the case is to be treated as one of set-off, the result would be that the damages for wrongful distress, which form part of the assets of the plaintiff company, would be pro tanto applied in payment of rent, and a particular creditor would get twenty shillings in the pound. Ought we by our order to bring about this result? Clearly not. Our order should be such that the damages for wrongful distress will be part of the plaintiff company's assets, while the defendants must prove in the liquidation for the amount of their judgment on the counter-claim. The parties should agree to the amount of damages. (1)

KENNEDY L.J. I agree that this appeal succeeds. I prefer to rest my judgment upon the point that has been mainly argued, that the defendants were not entitled to levy distress upon these particular goods. In my judgment these hoardings were not distrainable, even if the relation of landlord and tenant existed between the plaintiffs and defendants. Certain classes of goods are exempted from distress, although they were originally chattels before they were affixed to the realty, and may again become chattels. These posts, struts, and boards were originally chattels, but they were affixed to the realty for the purposes of the plaintiffs, to be used for purposes contemplated by the agreement between them and the defendants for the length of the agreed term. They were severable from the realty during the term. But the defendants had no right to distrain upon things in the possession of the plaintiffs so long as they were affixed to the realty, which these hoardings were at the time of seizure. *Darby* v. *Harris* (2) is a direct authority in the present case, and the recent decision of Phillimore and Walton JJ. in *Crossley Brothers* v. *Lee* (3), although not binding upon this Court, is also in favour of the plaintiffs' contention.

(1) The amount of damages for wrongful distress was agreed at 75*l*.

(2) 1 Q. B. 895.

(3) [1908] 1 K. B. 86.

I prefer to base my decision upon the ground with which I have already dealt, but I should not arrive at a different result if I had to consider alone the question whether the agreements created a tenancy or conferred a licence. I feel the force of the views expressed by Wills J. in *Taylor* v. *Pendleton Overseers*. (1) On the other hand, there is much in the present case that points to a contrary conclusion. Looking at the statement of what was let, which is expressed in terms to be a right to put up advertising hoardings, this, apart from the provisions on the back of the document, seems to indicate rather a licence than a tenancy. But I prefer, as I have said, to base my judgment on the ground which I have first considered.

The only other question concerns the form of the judgment which we ought to give. No doubt 151*l.* is due as the consideration which the plaintiffs ought to have paid to the defendants and which has been called rent. In an action in which the plaintiffs are entitled to claim damages for an illegal act, not justifiable as a distress, that is for a trespass to goods by seizing, selling, and taking them away, there could under the old practice be no sort of set-off in respect of a contractual debt in reduction of the plaintiffs' claim for damages. Now, however, a counter-claim may in ordinary cases be established, and if it exceeds the amount recovered on the claim the Court has power to give judgment for the defendant for the balance, if it thinks it right to do so; and similarly judgment for the balance may be given for the plaintiff if the amount recovered on the claim exceeds that recovered on the counter-claim. But the Court must consider in each case whether it would be right to give judgment for the balance, and if it would not be reasonable or right to deal with the claim and counter-claim by a judgment for the balance, then judgment should be given for the plaintiff on the claim and for the defendant on the counter-claim, costs following in each case. The result in the present case is that the plaintiff company, being in liquidation, will recover the damages for the wrongful act of the defendants for the benefit of those entitled to share in its assets, and the defendants will make a

(1) 19 Q. B. D. 288.

C. A. 1909

PROVINCIAL BILL POSTING COMPANY v. LOW MOOR IRON COMPANY.

claim in the liquidation in the usual way for the amount of their judgment on the counter-claim. The appeal must be allowed.

JOYCE J. I agree. It seems to me impossible to concur in the conclusion at which Bigham J. arrived. It is, I think, plain, on perusing the agreements, that they do not constitute a demise creating a tenancy, one of the incidents of which would be a liability to a distress by the landlord. It seems to me equally clear that, if there was a tenancy with a right in the defendants to distrain, the articles distrained on were of such a nature as to be fixtures, which, as has been settled by a long course of authorities, are absolutely privileged from distress.

Appeal allowed.

Solicitor for plaintiffs: *Arthur E. Burton, for Armitage & Speight, Leeds.*

Solicitors for defendants: *Mumford & Johnson, for W. J. Cousins & Fletcher, Leeds.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 21.

GADD *v.* PROVINCIAL UNION BANK.

Money-lender—Business carried on at other than registered Address—Loan effected at Borrower's Residence—Isolated Transaction—Illegality—Bill of Sale invalid—Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*), prohibits a money-lender from carrying on business at any other address than his registered address. Therefore, where, in the case of a loan by registered money-lenders in the way of their business, the transaction was entirely carried out at the house of the borrower:—

Held that, even if the transaction were an isolated one, and not in accordance with the usual course of the money-lenders' business, it was illegal as being in contravention of the Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*), and consequently void.

Appeal from an order of Hamilton J. at chambers refusing to grant an interim injunction as after mentioned.

The action was for damages for trespass in respect of the seizure by the defendants under a bill of sale of furniture and effects belonging to the plaintiff at his residence in Ilford, for an injunction to restrain the defendants from trespassing on plaintiff's premises and removing the said furniture and effects, and a declaration that the bill of sale was invalid.

The defendants were money-lenders whose registered business address was in Ipswich. On February 20, 1908, the defendants, in the course of their business, advanced a sum of 100*l.* to the plaintiff on the security of a bill of sale given by him upon his furniture and effects in his residence at Ilford. The whole of the loan transaction was carried out and completed at the plaintiff's residence.

It appeared that there had before the action been interpleader proceedings between execution creditors of the plaintiff and the defendants, as claimants under the bill of sale, in respect of the before-mentioned furniture and effects, which proceedings had terminated in favour of the defendants, the sheriff being directed to withdraw. In those proceedings the defendants' manager had been examined as a witness and had given evidence

C. A. 1909

GADD v. PROVINCIAL UNION BANK.

to the following effect. He stated that the rate of interest was discussed, the money was lent, and the bill of sale was executed at the plaintiff's residence; that the defendants had paid one Dobson a commission for introducing the loan; that, in consequence of this introduction, the defendants wrote to the plaintiff, and the defendants' manager went to see the plaintiff at his house and carried through the transaction there; that it was unusual for the defendants to carry out transactions at the borrower's, but they had done it on several occasions; and that this was the only transaction the defendants had had with the plaintiff. Instalments due under the bill of sale being in arrear, the defendants seized the furniture and effects comprised in the bill of sale. The plaintiff thereupon brought the action, and applied to the learned judge at chambers for an interim injunction restraining the defendants from trespassing on the plaintiff's premises and removing therefrom the before-mentioned furniture and effects. The learned judge refused the application.

Ritter, for the plaintiff. It is clear that, if the loan transaction in the present case contravened the provisions of the Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*), it is altogether void, and consequently the bill of sale would be invalid: *Victorian Daylesford Syndicate, Ld.* v. *Dott* (1); *Bonnard* v. *Dott* (2); *In re a Debtor, Ex parte Carden.* (3) Sect. 2, sub-s. 1 (*b*), of the Act prohibits the money-lender from carrying on business at any other address than his registered address. The loan transaction in the present case was clearly a carrying on of business by the defendants as money-lenders at an address other than their registered address.

W. de B. Herbert, for the defendants. It must be admitted that in this Court the decisions are conclusive to the effect that, if there has been a contravention by the money-lender of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, the transaction is void, and therefore the point that the transaction is not void, although there may have been such a contravention in this case, is not now open to argument, but is only taken for the purpose

(1) [1905] 2 Ch. 624. (2) [1906] 1 Ch. 740.
(3) (1908) 52 Sol. J. 209.

of keeping it open in the event of the case going to the House of Lords. But there has in this case been no contravention of s. 2, sub-s. 1 (*b*). What is prohibited by that sub-section is the carrying on of his business by a money-lender at an "address" other than his registered address. An isolated transaction, or a few transactions, such as the present, cannot be said to amount to a carrying on of his business by the money-lender otherwise than at his registered address. The statute does not say that everything done in the course of the money-lender's business must be done at the registered address; for instance, the sum lent may be sent to the borrower's address by a cheque, but surely that would not be an infringement of the Act. A tailor may properly be said to carry on his business where his shop is; but he may receive orders and deliver clothes at the houses of his customers; and yet he cannot be said to carry on business at their houses. The sub-section does not say that the money-lender shall not carry on business at any other "place" than his registered address, but at any other "address" than his registered address. The object of the section as a whole is that the borrower may know with whom he is dealing and where he is to be found. The object is, not that the money-lender shall be prevented from effectuating any transactions in the way of his business at any other place than his registered address, but that he shall be prevented from having any "address" at which he carries on business other than his registered address.

[FARWELL L.J. Could it be argued that a money-lender might carry on an isolated money-lending transaction in a name other than his registered name without contravening the Act?]

That case is hardly analogous to the present case. [He cited *Staffordshire Financial Co. v. Hunt* (1); *King* v. *Turnbull* (2); *Blair* v. *Buckworth* (3); *Kirkwood* v. *Ostwind* (4); *King* v. *Massey* (5); *Lazarus* v. *Gardner*. (6)]

(1) [1907] W. N. 258.
(2) (1908) 24 Times L. R. 434.
(3) (1908) 24 Times L. R. 474.
(4) (1908) Only reported in Matthews and Spear on the Money-lenders Act, 1900, p. 111.
(5) (1908) 24 Times L. R. 710.
(6) (1909) 25 Times L. R. 499.

C. A. 1909

GADD v. PROVINCIAL UNION BANK.

FLETCHER MOULTON L.J. In this case the defendants have raised points which are of considerable importance. Fortunately they none of them turn on disputed facts, for the facts of the case are admitted, and indeed are perfectly clear. The whole of this money-lending transaction was carried on at the house of the borrower, and not at the registered address of the money-lenders. Three points are taken by counsel for the defendants. First, he contends that this transaction was an isolated one, and was therefore not within the language of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900; secondly, he relies on the fact that in that sub-section the words used are "no other address," and not "no other place"; and, thirdly, he raises the point, (for the purpose of keeping it open in the event of an appeal to the House of Lords,) that, even if the transaction in this case offended against the provisions of s. 2, sub-s. 1 (*b*), it does not prevent the bill of sale from being good. This last point has been decided adversely to the defendants' contention by the Court of Appeal in *In re a Debtor, Ex parte Carden* (1), by which we are bound, and therefore, so far as we are concerned, the point is concluded by that case. Leaving that point, I will deal with the first point taken, namely, that an isolated transaction does not bring a money-lender within s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, or come within that sub-section, because the money-lender is not carrying on his money-lending business at the house of the borrower, even if he does carry out one money-lending transaction there. My brother Farwell put a difficulty to the counsel for the defendants, which he was unable to answer, namely, that, if his contention on this point were sound, then it would seem to follow by parity of reasoning that a single transaction carried on by a money-lender in a name other than his registered name would not be a contravention by him of the sub-section. Such a contention seems to me to involve an absurdity. It really involves the suggestion that a certain amount of infringement of the strict rules laid down by the Act is permissible. With regard both to the obligation to carry on the money-lending business in the registered name only and to the obligation to carry it on at the registered address

(1) 52 Sol. J. 209.

only, the Act is couched in the strictest terms, and in my opinion it was intended to provide that the money-lender's business should be carried on in the registered name and at the registered address, and only in that name and at that address, and to forbid the carrying on of even a single transaction in the way of the money-lender's business under any other name or at any other address. So much for the first point.

I now come to the second point. It was pressed upon us that the language of the section forbids the carrying on of the business "at any other address" than the registered address, not "at any other place." What then is the meaning of that language? Can it be said that the money-lender is carrying on business at his registered address, and not carrying on business at any other address within the meaning of the sub-section, if he goes about like a pedlar doing the whole of his business at the houses of the borrowers? I cannot think so. The positive part of s. 2, sub-s. 1 (*b*), provides that the business shall be carried on at the money-lender's registered address, or in other words that it shall be carried on there, and not elsewhere; and then comes in the negative part of the section, which provides that it shall be carried on at "no other address." I think we should be giving the enactment an interpretation in the very teeth of its language and purview if we were to hold that a money-lender could carry on individual transactions otherwise than at his registered address without contravening its provisions. The result of the view which we take of the first two points is that, according to the decision in *In re a Debtor, Ex parte Carden* (1), the whole transaction is void. Therefore the appeal must be allowed and an interim injunction must be granted.

FARWELL L.J. I am of the same opinion. This appeal raises a question upon the meaning of s. 2, sub-s. 1 (*b*), of the Money-lenders Act, 1900, as to which there has been some difference of judicial opinion, namely, whether an isolated money-lending transaction can amount to a breach of its provisions, or whether there must be a course of dealing to constitute such a breach. The evidence given by the defendants'

(1) 52 Sol. J. 209.

C. A. 1909

GADD v. PROVINCIAL UNION BANK.

Farwell L.J.

manager shews clearly that in this case the entirety of the isolated transaction, which was undoubtedly a transaction in the way of the business of the defendants as money-lenders, was carried on otherwise than at the defendants' registered address; for he stated that the rate of interest was discussed, the money was lent, and the bill of sale was executed at the plaintiff's residence; that, in consequence of an introduction by one Dobson, he went to see the plaintiff at his house and carried through the transaction there; that it was unusual for the defendants to carry out transactions at the borrower's house, but they had done it on several occasions. I do not propose to rely on that last statement, but will treat the case as the simple case of a single money-lending transaction carried on in its entirety at the borrower's house. The question is whether such a transaction is within the provisions of s. 2, sub-s. 1 (*b*), of the Act. In my opinion it clearly is within them. This is the only point with which I propose to deal, my brother Fletcher Moulton having so fully dealt with the other points raised by the appeal. It has been suggested by some of the judges of the King's Bench Division that sub-s. 1 (*b*) of s. 2 applies only to a course of dealing, and not to an isolated transaction. I cannot follow that suggestion, because a money-lender's business consists of a series of isolated transactions; and the effect of the enactment clearly is that no part of that business is to be carried on otherwise than in his registered name, and at his registered address, under a penalty not exceeding 100*l.* for any contravention of that enactment. I cannot bring myself to doubt that, if a money-lender carries on an isolated transaction in the way of his business otherwise than in his registered name, or at any other address than his registered address, he contravenes the provisions of the sub-section. If that is not so, I fail to see where the line is to be drawn. Suppose that a money-lender has many hundreds of clients; might he lawfully carry on transactions otherwise than in his registered name, or at an address other than his registered address, with ten, or with twenty, or with fifty of them? With how many of them might he carry on money-lending transactions at their own houses without offending against the provisions of the sub-section? I

adhere to what I said in my judgment in *Blair* v. *Buckworth* (1), which is reported as follows: "There was a difficulty in saying that the carrying out of a single transaction at a place which was not the money-lender's registered address was not a violation of the Act. The only thing attacked was that individual transaction, and that individual transaction, if not carried out at the registered address, seemed to infringe the provision which said that it must be done at no other than the registered address. The money-lending transaction apparently took place where the money was lent and the documents signed, even if the negotiations might take place elsewhere. The words in s. 2, sub-s. 1 (*b*), 'at no other address' would have to be considered by the Court which had finally to determine the point. It was also to be observed that s. 2, sub-s. 2, imposed a fine not exceeding 100*l.* upon a first conviction and a fine or imprisonment upon a second or subsequent conviction, which rather pointed to individual transactions." It seems to me that individual transactions are what was aimed at by the Act. Each transaction otherwise than in accordance with the Act is an offence against the Act and punishable as such; and I can see no other construction of the Act by which due effect can be given to its provisions, which were obviously intended by the Legislature to be of a very stringent nature.

Appeal allowed.

Solicitor for plaintiff: *J. K. Torkington.*

Solicitors for defendants: *Carthew & Wheeler, for Lawton, Warnes & Sons, Ipswich.*

(1) 24 Times L. R. 474.

E. L

1909
April 2, 5;
May 4.

INTERNATIONALE GUANO EN SUPERPHOSPHAAT-WERKEN *v.* ROBERT MACANDREW & CO.

Ship—Charterparty—Excepted Perils—Deviation—Damage to Cargo—Liability of Shipowner.

The plaintiffs chartered the defendants' ship to carry a cargo of superphosphates in bags for delivery at Algeciras and Alicante, with leave to call at Corunna. The vessel was delayed at Corunna and Algeciras. On leaving Algeciras she deviated from the chartered voyage by going to Seville, whence she went to Alicante. By reason of the various delays the cargo delivered at Alicante was damaged, the damage being due to the action of sulphuric acid in the superphosphates eating away the bags:—

Held, that the deviation to Seville put an end to the charterparty as from the beginning of the voyage, and that the defendants were therefore, as to the whole voyage, under the obligations of common carriers; that as regards damage to the cargo by the delay at Corunna and Algeciras the defendants were not liable, the damage being due to the nature of the cargo, and not to any failure on the part of the defendants to carry the goods with reasonable despatch; but that as regards the increased damage due to the delay occasioned by the deviation itself the defendants were liable under the obligations of common carriers.

Joseph Thorley, Ld. v. *Orchis Steamship Co.*, [1907] 1 K. B. 660, considered and applied.

Action in the commercial list tried by Pickford J. without a jury.

By an agreement in writing dated September 20, 1907, and made between the plaintiffs and the defendants as agents for the owners of the steamship *Cid*, the plaintiffs chartered the *Cid* to proceed to Zwijndrecht in Holland and there load at the plaintiffs' wharves a cargo of superphosphate in bags, and being so loaded to proceed to Malaga and Alicante and there deliver the cargo, the steamer to have the option of calling at Corunna for cattle for Gibraltar. By subsequent correspondence between the parties it was agreed that the chartered voyage should be to Algeciras and Alicante instead of to Malaga and Alicante.

The charterparty contained the following exceptions:—"The act of God, perils of the sea, fire on board, in hulk or craft or on shore, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people,

collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error of judgment of the pilot, master, mariners or other servants of the shipowner. Not accountable for any loss or damage arising from explosion, bursting of boiler, breakage of shafts, or any latent defect in the machinery or hull."

The facts, which are fully stated in the judgment, were shortly as follows. The *Cid* was duly loaded at Zwijndrecht with a cargo of superphosphates in bags, part to be delivered at Algeciras and part at Alicante. She called at Corunna to load cattle, and was delayed there by stormy weather for about seven days, instead of the few hours necessary for the actual loading of the cattle. She then sailed for Gibraltar, delivered her cattle, and went to Algeciras. At Algeciras she was delayed about ten days by the slowness of discharge of the superphosphates for that port. From Algeciras, instead of proceeding direct to Alicante, she deviated to Seville to load a shipment of ore. The actual time lost by this deviation to Seville was about six days. She arrived at Alicante on November 11, thirty-four days after sailing from Zwijndrecht. But for the above-mentioned delays at Corunna and at Algeciras, and by the deviation to Seville, the voyage to Alicante should have occupied about fourteen to twenty days. At Alicante the cargo delivered there was found damaged. Claims were made for this damage by the consignees upon the plaintiffs, which the plaintiffs settled for 310*l.*, and this sum they claimed in the action. It was a matter of dispute at the trial whether there was any damage to the cargo delivered at Algeciras. No claims in respect of that were made upon the plaintiffs or paid by them, but there was evidence of some damage having been done to it, though to a smaller extent than the damage sustained by the Alicante parcel. The plaintiffs contended that the defendants were liable for the whole 310*l.*, and that they were by the deviation disentitled from relying upon any of the exceptions in the charterparty. Alternatively the plaintiffs contended that the whole of the 310*l.* damage was caused by the deviation. The defendants disputed both these contentions and maintained that all the damage was caused by the inherent vice of the cargo and by the age and condition of the bags in which it was shipped

1909

INTERNATIONALE GUANO EN SUPERPHOSPHAATWERKEN v. ROBERT MACANDREW & Co.

Scrutton, K.C., and *Leck*, for the defendants. Although the vessel in going to Seville deviated from the chartered voyage, the defendants are nevertheless entitled to rely on the exceptions in the charterparty as a defence to so much of the claim as relates to the damage to the cargo before the deviation took place: *Davis* v. *Garrett* (1); *Lilley* v. *Doubleday*. (2) It will be said that the decision in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (3) is against this contention, but in that case the Court had not to consider and did not decide this point, for there all the damage occurred after the deviation had taken place. With regard to the damage which occurred after the deviation the defendants are, no doubt, deprived of the benefit of the exceptions in the charterparty, and their obligation towards the cargo became that of a common carrier. As common carriers the defendants are not liable for any damage due to improper packing or inherent vice of the cargo, and on the evidence the Court ought to find as a fact that the damage was due to those two causes. [*Brass* v. *Maitland* (4) was also referred to.]

Simon, K.C., and *F. D. Mackinnon*, for the plaintiffs. The decision in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (3) covers this case. The cargo was delivered to the defendants in good condition for carriage on the terms of the charterparty. It was delivered to the consignees at the end of the voyage in a damaged condition, and it is for the defendants to shew why they are not liable to make good the damage. Not having performed the voyage stipulated for by the contract, they cannot rely on the terms of the contract; the contract is gone, and it is therefore immaterial at what stage of the voyage the damage occurred. The judgment of the Court in *The Europa* (5) shews that *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (3) supports this contention. Further, it is a mistake to suppose that the defendants, being disentitled by their own act from relying on the express exceptions in the charterparty, can now set up other exceptions implied by common law: see Carver on Carriage by Sea, 4th ed., ss. 74, 75. The onus is on the defendants to prove

(1) (1830) 6 Bing. 716.
(2) (1881) 7 Q. B. D. 510.
(3) [1907] 1 K. B. 660.
(4) (1856) 6 E. & B. 470.
(5) [1908] P. 84.

that the damage was due to inherent vice, and they have not discharged that onus. [They also cited *Foster* v. *Great Western Ry. Co.* (1) and *Mallet* v. *Great Eastern Ry. Co.* (2)]

Scrutton, K.C., in reply, cited *Morritt* v. *North Eastern Ry. Co.* (3)

Cur. adv. vult.

May 4. PICKFORD J. This was an action tried before me which involved a claim for damages to a cargo of superphosphate carried on a steamer called the *Cid* under a charterparty made by the defendants or under which they are liable. The cargo was loaded at Zwijndrecht, in Holland, and was to be carried partly to Algeciras and partly to Alicante, the ship having the option of calling at Corunna for cattle. The superphosphate, when it is first made, comes out of what is called a mixer quite hot, and contains a considerable quantity of free sulphuric acid which is used for the purpose of the manufacture. Before being shipped it is cooled, and the free acid diminishes according to the time the superphosphate is kept under this process. It is kept a longer or a shorter time according to the length of the voyage. Sometimes it has to go only a very short voyage, sometimes a longer voyage, and the superphosphate which has to be sent on a long voyage requires more effective cooling than that which has to be sent simply on a short voyage; and the reason of that is that this free acid has a corrosive effect on the bags in which the superphosphate is shipped, and the longer it has to be kept in them the more important it is to get rid of the free acid. If it has to be sent upon a long voyage it is also packed either in stronger bags or in double bags instead of single ones, whereas on a short voyage it is often packed only in single bags. Some attack was made on the method of the preparation and bagging of this particular cargo, but I am satisfied that it was properly prepared and bagged for a voyage of ordinary length to Spain, that is, for about fourteen or twenty days.

The *Cid* left Zwijndrecht on October 8, 1907. She arrived at Corunna on October 13 and left there on October 21, having

(1) [1904] 2 K. B. 306. (2) [1899] 1 Q. B. 309.
(3) (1876) 1 Q. B. D. 302.

1909

INTERNATIONALE GUANO EN SUPERPHOSPHAATWERKEN v. ROBERT MACANDREW & Co.

Pickford J.

been there a considerable time. She arrived at Algeciras on October 25 and discharged part of her cargo there, and left Algeciras on November 4, there being a considerable detention at Algeciras as well as at Corunna. From Algeciras she ought to have gone direct to Alicante, but instead of that she went to Seville for the purposes of the shipowners. She arrived at Seville on November 5; she left on November 8 and arrived at Alicante on November 11. This was a deviation and was not authorized by the charterers, and some five or six days were occupied by that deviation. At Alicante the cargo was found to be seriously damaged by reason of the acid having corroded the bags and allowed some of the superphosphate to escape. When the bags were sufficiently corroded to allow the superphosphate to escape it came into contact with other parts of that same bag and also with other bags, and so caused further damage; and the damage increased, and in an increased ratio, with each day the cargo was allowed to remain in that condition. Claims were made upon the plaintiffs in respect of that damage, and they settled those claims for a sum of 310*l.*, which is the sum they now claim from the defendants.

The plaintiffs allege that the deviation puts an end to the charterparty as from the beginning of the voyage and prevents the defendants from relying on any of the exceptions at any period of the voyage, and that therefore they are liable for the whole of the damage as common carriers. The defendants deny that proposition and say they are only liable for such damage as was occasioned by the deviation; and they also say that the damage in this case was occasioned by the inherent vice of the cargo. They also allege, as I have said, improper preparation and bagging, but, as I have also said, I do not act upon that contention. The defendants also said that a greater proportion of the damage, if not the whole, occurred before deviation, and that they are protected at any rate as to that damage by the provisions of the charterparty, because they say that the exceptions will apply to any part of the voyage which was before the deviation, and that they are only deprived of the benefit of the exceptions after the deviation.

I have therefore to decide the effect of the deviation upon the

1909

INTER-NATIONALE GUANO EN SUPER-PHOSPHAAT-WERKEN v. ROBERT MACANDREW & Co.

Pickford J.

obligations and rights of the parties, and that depends really upon what I take to be the true effect of the decision in the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) The plaintiffs contended that the effect of that decision was to support their contention that a deviation put an end to the contract between the parties by way of charter from the beginning of the voyage, no matter when or where the deviation took place. The defendants contended that that was not the effect of the decision, because that point was not before the Court at that time, the deviation in that case having occurred at the beginning of the voyage. Now it is not necessary for me to cite that case at any length. The conclusion I have come to is that it does decide that where there is a deviation the special contract by charterparty ceases to exist. It was not necessary for the Court in that case to consider the effect of a deviation in the middle or towards the end of the voyage, and I am not at all clear that that point was present to the minds of the learned judges in delivering judgment, and for two reasons. The first is that, as I have said, the deviation in that case took place at the beginning of the voyage, and, in the second place, all the learned judges refer several times to the analogy of cases decided upon policies of insurance, and in the case of insurance a deviation only avoids the policy from the time it takes place. If the question in this case had been present to the minds of the Court, I think they probably would have pointed out the different effect of deviation in those two cases. But, however that may be, they laid down propositions, not dicta, but as the foundation of their judgment, which go the full length I have mentioned, and I think I must accept it; and I am strengthened in this opinion by the fact that I think this view of the decision in that case was taken by Bucknill and Bargrave Deane JJ. sitting as a Divisional Court in the case of *The Europa.* (2) I think, therefore, on the authority of that case, I must hold that the defendants cannot rely on the terms of the charterparty and must be treated in this case as common carriers. It was suggested by one of the learned judges in the case of *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (1) that

(1) [1907] 1 K. B. 660. (2) [1908] P. 84.

1909

INTER-NATIONALE GUANO EN SUPER-PHOSPHAAT-WERKEN v. ROBERT MACANDREW & Co.

Pickford J.

they might have been in a less favourable position than even common carriers, but his Lordship did not point out in what way. I do not think for the purposes of this case that they can be in a worse position than that of common carriers.

That still leaves a serious question to be decided, and that is this: whether as common carriers they are responsible for the damage in this case, it being alleged that it was occasioned by the inherent vice and the nature of the goods themselves. Now, common carriers, as I take it, are not liable for damage due to the nature of the thing carried so long as they perform their voyage with reasonable despatch under all the circumstances which they have to encounter. I think that until the deviation in this case the defendants did perform the voyage with reasonable despatch. The delay at Corunna was beyond what was expected and was considerably longer than anybody contemplated, but the evidence before me was that it was due to bad weather which made it unsafe for the vessel to proceed on her voyage. I have had more doubt about the long time which was occupied in discharging at Algeciras, but I have no evidence that it was due to negligence or to the orders to go to Seville, and I do not see my way to reject the evidence of the master that it was due to the want of facilities for discharging and to the fact that they did not discharge at a quay, but had to discharge in the roads. As I have said, I think the cargo was properly cooled and bagged for an ordinary voyage to Spain, but I do not think it was in a condition to stand an excessively long voyage of thirty-four days to which it was exposed. I think one part of Mr. De Lange's evidence supports me in that. He said he would not have consented to their calling at Corunna at all if he had had any notion that the delay there would have been so long; and the reason for that, no doubt, was that he anticipated that such a delay would injure the cargo, prepared as it was for a shorter voyage. I think there must have been damage arising from that delay and from the long time which was occupied in discharging at Algeciras. The evidence is conflicting as to the state of the cargo at Algeciras, but I think there was damage to the cargo which was discharged there, and I think there was also damage to the cargo afterwards discharged at Alicante after it

1909

INTER-NATIONALE GUANO EN SUPER-PHOSPHAAT-WERKEN v. ROBERT MACANDREW & CO.

Pickford J.

arrived at Algeciras. It is said that no claims were made in respect of the Algeciras cargo, and that may be so, but I think there was damage to the whole of the cargo at Algeciras ; and I further think that from the time the vessel left Algeciras, when the deviation began, the damage went on increasing, so that the Alicante cargo was in a worse condition when it arrived at Alicante. I do not accept the evidence of the master and the mate that the condition at Algeciras and Alicante was the same. It is contrary, I think, to common sense that there should be no effect from the extended five or six days which were occupied in consequence of the vessel going to Seville and from the fact that the holds were open and that cargo was loaded—I do not think there was any discharged—at that port, and also in the voyage from Seville to Alicante. It is also contrary to the undisputed fact that a great deal more rebagging was required in respect of the cargo discharged at Alicante than in respect of the cargo which was discharged at Algeciras. When damage of this kind once sets in, as I have said, it increases at an increasing rate with each day that the cause is allowed to exist, and this would be especially so where the holds had been opened for a considerable time, as they were at Algeciras, and also as they were at Seville. I think the condition of the cargo was obvious to the master at Algeciras, and therefore I think he cannot protect himself by saying that he did not know that the nature of the cargo was such that a prolongation of the voyage would increase the damage that was taking place. I think he ought to have known that it should be discharged as soon as possible, and I think its condition was much aggravated by the extra time occasioned by the deviation after its exposure at Algeciras, and although a common carrier is not responsible for damage arising from the nature of the article itself, so long as he performs his voyage properly, he is responsible if he aggravates that damage by any breach of contract on his part. In this case I think he did. I think there was a considerable aggravation of the damage to the cargo occasioned by the deviation to Seville and the five or six extra days which were consumed in consequence. How much I have to attribute to that and how much I have to attribute

1909

INTERNATIONALE GUANO EN SUPERPHOSPHAATWERKEN v. ROBERT MACANDREW & Co.

Pickford J.

to what took place before she reached Algeciras it is very difficult to say. I can only estimate it as best I can as a jury would estimate it. I was rather invited to say that I could estimate it by a sort of proportion between the number of new bags required or the amount of rebagging required to the smaller cargo which was discharged at Alicante compared with the amount which was required with regard to the larger cargo at Algeciras, but I do not think I can take it in that way. The best I can do is to make an estimate from all the facts, and, on the whole, the conclusion I have come to is that the plaintiffs are entitled to the sum of 175*l.* in respect of the damage which is attributable to the act of the defendants, and I shall give judgment for that amount with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Stephenson & Harwood.*
Solicitors for defendants: *Lowless & Co.*

F. O. R.

1909
May 11.

BOOTH *v.* WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED.

Company—Arrangement with Creditors — Judgment—Staying Proceedings—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120.

On an application by the defendant company under s. 120 of the Companies (Consolidation) Act, 1908, an order was made that meetings of the creditors and of the members of the company be summoned for the purpose of considering and, if thought fit, of agreeing to an arrangement proposed to be made between the company and its creditors and members. Before the meetings had been held, the company applied to the Court to grant a stay of execution on a judgment recovered by the plaintiff against the company previously to the making of the order summoning the meetings:—

Held, that there was no power to grant a stay of execution.

MOTION.

On April 14, 1909, the plaintiff recovered final judgment in the King's Bench Division against the defendant company for 102*l.* 9*s.* 4*d.* for debt and 8*l.* 10*s.* for costs. On April 22, 1909,

1909

BOOTH v. WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED.

in pursuance of the recommendation of a committee of the creditors of the company held on April 7, the company caused an originating summons to be issued in the Court of the Chancery of the county palatine of Lancaster for an order under s. 120 of the Companies (Consolidation) Act, 1908 (1), that meetings of the creditors and of the members of the company should be summoned for the purpose of considering and, if thought fit, approving of a scheme of arrangement proposed to be made between the creditors, members, and the company. On April 26 an order was made by the Vice-Chancellor ordering the meetings of creditors and members to be held on May 17. Notice of the meetings and of the proposed scheme was sent to the plaintiff.

On May 7 the company gave notice of this motion, which was for a stay of execution on the judgment in this action until after May 17, and, if the scheme of arrangement was approved at the meetings of creditors and members of the company to be held on that day, for the stay of execution to be further continued until after an application to sanction the scheme should have been heard and determined by the Court of the Chancery of the county palatine.

(1) Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 120:

"(1.) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application in a summary way of the company or of any creditor or member of the company or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

"(2.) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

"(3.) In this section the expression 'company' means any company liable to be wound up under this Act."

1909

BOOTH v. WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED.

Langdon, K.C., and *Herbert Jacobs*, for the defendant company. In the circumstances of this case the defendant company is entitled to have a stay of execution on the plaintiff's judgment. The procedure provided by s. 120 of the Companies (Consolidation) Act, 1908, with regard to arrangements or compromises between companies and their members or creditors is merely a development of the previous law. Under the Companies Act, 1862, where there was either a compulsory or voluntary winding-up of a company, the Court had power to, and almost invariably did, restrain further proceedings in actions against the company. *Westbury* v. *Twigg* (1) is a strong instance of the exercise of this power, for there the writ of fi. fa. had actually been lodged with the sheriff. Then by s. 2 of the Joint Stock Companies Arrangement Act, 1870, the liquidator of a company that was being wound up was empowered to apply to the Court to sanction an arrangement or compromise which had been approved of at a meeting of the creditors, and if the Court did sanction the arrangement or compromise the further proceedings in the winding-up were stayed. By s. 38 of the Companies Act, 1907, s. 2 of the Act of 1870 was applied to companies which were not being wound up, and s. 38 is in substance reproduced in s. 120 of the Act of 1908. It having been the practice to stay all further proceedings in actions against a company where a liquidator had been appointed, it follows by analogy that, now that an arrangement may be proposed without there being any winding-up or liquidator, the same practice should apply. The principle governing this practice is the same as was followed by the Court of Chancery in administration actions, in which the Court would always restrain by injunction any dealing with the estate which was being administered: *Carron Iron Co.* v. *Maclaren.* (2) If execution is not stayed in this case, the plaintiff will be placed in so much more favourable a position than the other creditors of the company that it will be impossible to carry out the proposed arrangement.

T. Clarkson, for the plaintiff. The plaintiff, having recovered judgment against the defendant company, is not to be prevented from pursuing his lawful remedy of execution, except by some

(1) [1892] 1 Q. B. 77. (2) (1855) 5 H. L. C. 416.

express statutory enactment or by a necessary implication therefrom. By s. 140 of the Act of 1908, which reproduces s. 85 of the Act of 1862, power is expressly given to the Court to restrain proceedings against a company at any time after the presentation of a petition for winding up. There is no express provision giving that power in cases of arrangement or composition under s. 120, nor is there any implied power to do so. There is no analogy between proceedings under s. 120, where there is no winding-up, and a case where a company is being wound up. In the latter case, or in the case of an administration decree, there is a finality which is entirely lacking here, because all that has been done in this case is to order that meetings of the creditors and of the shareholders shall be held, and at present it is uncertain whether there will ever be an arrangement arrived at. [He referred to *Ex parte McLaren*. (1)]

Langdon, K.C., in reply.

DARLING J. In my opinion it is not possible to decide this question, as we have been invited to do by counsel for the defendant company, on grounds of abstract justice. The question whether the defendant company are entitled in the circumstances that have arisen to have execution on the plaintiff's judgment stayed is one which must be determined by a consideration of the provisions of the Act of Parliament. [The learned judge stated the facts, and continued:—] I am far from saying that, if the meetings of the creditors and of the shareholders of the company had been held, and if the proposed scheme of arrangement had been agreed to at those meetings and had been sanctioned by the Court, a stay of execution on a judgment obtained against the company might not be ordered. It is, however, not necessary to decide that point, for that stage has not yet been reached in this case. All that has happened here is that the judge has made an order for the summoning of meetings of creditors and shareholders, and until those meetings have been held it is impossible for any one to say whether the scheme will or will not be agreed to. It is said that the circumstances of the present case are analogous to a case of a compulsory or voluntary

(1) (1881) 16 Ch. D. 534.

1909

BOOTH v. WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED.

Darling J.

liquidation. I am of opinion that there is no analogy. Under s. 120 of the Companies (Consolidation) Act, 1908, where a compromise or arrangement is proposed between a company and its creditors, the Court may, on the application of the company, or of a creditor, or, in the case of a company being wound up, of the liquidator, order meetings of the creditors or of the shareholders to be summoned. It is plain that where a company is in liquidation, either compulsory or voluntary, the Court has power on the application of the liquidator to grant a stay of execution on a judgment against the company. If a liquidator applies under s. 120 for meetings to be summoned, and the scheme of arrangement is eventually approved and receives the sanction of the Court, an order may be made determining the winding-up, but until that has been done the liquidation is still in existence and the rights of the liquidator remain. That state of things bears no analogy to a case where there is no liquidation in progress and the application under s. 120 is made by the company; for in the latter case there is nothing but a mere project or proposal which may lead to nothing, and there is, therefore, no reason why at that stage the rights of a judgment creditor of the company should be affected. For these reasons I am of opinion that this application fails, and the defendants' motion must therefore be dismissed.

JELF J. I am of the same opinion. It seems to me that on principle this case does not come within that class of cases in which a defendant has a right to have a stay of execution granted. It has been said by great judges in the past that a judgment creditor is prima facie entitled to obtain the fruits of his judgment by means of execution. It may be that, if he does so, hardship is caused to the other creditors of the judgment debtor, but first come first serve is one of the necessary axioms of this life of ours. A man who has obtained judgment may have been more diligent or merely more fortunate than the other creditors of the defendant, but he is nevertheless in the de facto position of being prima facie entitled to issue execution on his judgment. It is true that in certain cases it may be just that a judgment creditor should not be allowed to proceed to execution,

1909

BOOTH v. WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED.

Jelf J.

but should be put on the same footing as the other creditors. The case of a decree in an administration suit is an instance of that, and, similarly, where there is a compulsory winding-up of a company, something analogous to a decree of administration takes place, and, therefore, execution on judgments against the company is stayed. In the case of a voluntary liquidation also it may be right that in certain circumstances a judgment creditor should be compelled to give up some of his rights. But in the present case, where steps are being taken by a company, which is not in liquidation, for the arrangement of the company's affairs under s. 120 of the Companies (Consolidation) Act, 1908, the position is not in the least analogous to that of a compulsory or voluntary winding-up. There has merely been an order for the holding of meetings by the creditors and by the members of the defendant company, at which the proposed scheme of arrangement is to be considered. It may be that the scheme will be approved of at those meetings and that it will receive the sanction of the Court, but on the other hand it may not, and in these circumstances I cannot see what right the defendant company or the other creditors of the company have to say that the fact that this order has been made convening those meetings is a reason for preventing the plaintiff from exercising his rights under his judgment. It has been suggested that the stay might be granted on condition that the money was brought into Court, but if there is power to grant a stay on terms there must be power to do so without terms, and in the absence of any statutory provision I do not think that either common justice or any principle of equity requires that, in the circumstances of this case, the plaintiff, who has recovered judgment against the company, should be placed on the same footing as the other creditors, who have not done so.

Motion dismissed.

Solicitors for plaintiff : *Hewitt, Urquhart & Woollacott, for John Hewitt & Son, Manchester.*

Solicitors for defendant company : *Hewitt Urquhart & Woollacott, for Hall, Son & Hawkins, Manchester.*

F. O. R.

1909
April 29.

In re THE DUKE OF NORTHUMBERLAND AND THE MAYOR, &c. OF TYNEMOUTH.

Lands Clauses Acts—Copyholds—Enfranchisement—Compensation—Delay in Enfranchisement—Interest—Quittances—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96, 97.

In 1901 certain copyhold land was, under the powers of the Burial Acts, 1852 to 1900, and the Lands Clauses Act, 1845, purchased from the copyhold tenants thereof by the local authority of the district for the purpose of a burial ground, and the conveyance was duly enrolled on the court rolls of the manor. The local authority entered into possession, and negotiations proceeded between the lord of the manor and the local authority as to the amount of compensation payable to the lord for the enfranchisement of the land in pursuance of s. 96 of the Lands Clauses Act, 1845, and these negotiations were continued until 1908, when it was agreed to refer the matter to an arbitrator. No blameworthy delay had occurred. The lord continued in possession of all manorial rights, and all rents had been paid to him. The lord claimed compensation for, among other things, the loss of quittances, and also interest upon the compensation money from the date of the obligation to enfranchise to payment. A quittance was a customary charge of 4*d.* for every receipt which a copyholder required to be given to him in respect of any manorial payment, but the charge could not be enforced if a copyholder was content to make the payment without requiring a receipt. The arbitrator awarded compensation for the loss of the quittances, and with regard to the claim for interest he found that the rents received by the lord were not an equivalent for the interest, and he awarded interest at the rate of 4 per cent. per annum:—

Held, that the lord was entitled under s. 96 of the Lands Clauses Act, 1845, to compensation for the loss of the quittances; and that, upon the principle laid down in *In re Marquis of Salisbury and London and North Western Ry. Co.*, [1892] 1 Ch. 75, n., he was entitled to interest upon the compensation money at the rate of 4 per cent. per annum, deducting therefrom the amount of the rents received by him.

AWARD of an arbitrator stated in the form of a special case.

By an indenture of conveyance dated July 26, 1901, certain hereditaments, copyhold of the manor of Tynemouth, of which the Duke of Northumberland was the lord, containing an area of about forty acres and forming part of a farm known as Hawkey's Hall Farm, were, together with certain freehold hereditaments forming the residue of Hawkey's Hall Farm, conveyed to the corporation of Tynemouth by the copyhold tenants

thereof for the purpose of a burial ground for the borough of Tynemouth, the corporation, as the burial board for the borough, having purchased the lands under the powers conferred upon them by the Burial Acts, 1852 to 1900, and the Lands Clauses Act, 1845. The conveyance was duly enrolled on the court rolls of the manor on August 27, 1901. By a second indenture of conveyance, dated November 28, 1901, another parcel of land, also copyhold of the manor, was purchased by, and conveyed by the copyhold tenants thereof to, the corporation under the like powers for the purpose of forming part of the burial ground, and of making a public highway upon a portion thereof, and this conveyance was duly enrolled on the court rolls of the manor on December 5, 1901. The corporation went into possession of the lands so purchased by them.

Thereupon it became necessary to have the lands so conveyed to the corporation enfranchised under the provisions of ss. 95, 96, and 97 of the Lands Clauses Act, 1845 (1), and to have the

(1) 8 & 9 Vict. c. 18, s. 95: "Every conveyance to the promoters of the undertaking of any lands which shall be of copyhold or customary tenure, or of the nature thereof, shall be entered on the rolls of the manor of which the same shall be held or parcel; and on payment to the steward of such manor of such fees as would be due to him on the surrender of the same lands to the use of a purchaser thereof he shall make such enrolment; and every such conveyance, when so enrolled, shall have the like effect in respect of such copyhold or customary lands as if the same had been of freehold tenure; nevertheless, until such lands shall have been enfranchised by virtue of the powers hereinafter contained, they shall continue subject to the same fines, rents, heriots, and services as were theretofore payable and of right accustomed."

Sect. 96: "Within three months after the enrolment of the conveyance of any such copyhold or customary lands, or within one month after the promoters of the undertaking shall enter upon and make use of the same for the purposes of the works, whichever shall first happen, or if more than one parcel of such lands holden of the same manor shall have been taken by them, then within one month after the last of such parcels shall have been so taken or entered on by them, the promoters of the undertaking shall procure the whole of the lands holden of such manor so taken by them to be enfranchised, and for that purpose shall apply to the lord of the manor whereof such lands are holden to enfranchise the same, and shall pay to him such compensation in respect thereof as shall be agreed upon between them and him, and if the parties fail to agree respecting the amount of the compensation to be paid for such enfranchisement, the same shall be determined as in other cases of

1909

NORTHUMBERLAND (DUKE) AND TYNEMOUTH CORPORATION, *In re.*

amounts payable to the lord as compensation for such enfranchisement ascertained in accordance with the provisions of the Act, and negotiations for that purpose were entered into in March, 1902, and were continued from that date down to February, 1908, when by an indenture dated February 21, 1908, all questions affecting the minerals under the lands were settled, and it was agreed to refer to an arbitrator all other matters concerning the compensation payable for enfranchisement.

The lord's claim to compensation fell under five heads, namely, (1.) rents; (2.) forfeitures and escheats; (3.) facilities for improvement; (4.) loss of quittances; and (5.) interest from the date of the obligation to enfranchise to actual payment of the compensation money. The first three heads of claim involved only questions of fact, and the arbitrator made a final award in respect of them. With respect to each of the last two heads of claim the arbitrator stated the following facts and submissions, together with his alternative award thereon:—

Loss of quittances. A quittance as known in the manor of Tynemouth was a customary charge of 4*d.* per half-year made by the bailiff of the manor for every receipt which a copyholder required him to give in respect of any manorial payment. It was admitted that this charge of 4*d.* was not enforceable by any legal proceedings if a copyholder was content to make payment without requiring a receipt. Down to 1901 every copyholder in the manor had paid quittance for his receipt. Since that date about seventy out of between five hundred and six hundred refused to pay such quittances, and no steps were taken by the lord against any of them. None of the payments exceeded the sum of 2*l.* It was submitted on behalf of the lord that there was a reasonable probability that a great majority of the tenants would

---

disputed compensation; and in estimating such compensation the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for."

Sect. 97 provides that upon payment or tender of the compensation the lord of the manor shall enfranchise the lands.

continue to require receipts as formerly and to make the customary payments, and that the claim was maintainable and the loss due to enfranchisement one that could properly be assessed. It was submitted on behalf of the corporation that the payment was voluntary, and that uncertain payments of such a character were not an incident of the lord's tenure upon the prospective loss of which a claim could be based within the meaning of s. 96 of the Lands Clauses Act, 1845, and that there was no possible basis of assessment. If the contention on behalf of the lord was right, the arbitrator found that the lord was entitled to compensation on the basis of sixteen years' purchase; and if the contention on behalf of the corporation was right, no compensation was payable for loss under that head.

Interest. In accordance with s. 95 of the Lands Clauses Act, 1845, the lord had been and was still in possession of all manorial rights, and all rents had been paid to him, but such rents were not an equivalent for the interest claimed. No blameworthy delay had occurred. It was submitted on behalf of the lord, upon the authority of Jessel M.R. in *In re Marquis of Salisbury and London and North Western Ry. Co.* (1), that the lord was entitled to interest if the rents and receipts did not amount to an equivalent for the interest, and that his rights in this respect were not affected by questions of delay or by the fact that he had been in possession of his manorial rights, unless such rights gave him a sum equivalent or nearly equivalent to the interest on the purchase-money. It was submitted on behalf of the corporation that there was no provision in these sections of the Lands Clauses Act, 1845, for payment of interest, and that the interests of the lord were safeguarded by the fact that until the completion of the enfranchisement he had the fines and forfeitures and fees and anything that was incident to the manorial rights; that the lord's remedy was by an action for mandamus; and that the observations of Jessel M.R. in *In re Marquis of Salisbury and London and North Western Ry. Co.* (1) upon this question were obiter dicta. If the contention on behalf of the lord was right, the arbitrator found that the lord was entitled to interest at the rate of 4 per cent. per annum from

(1) (1879) [1892] 1 Ch. 75, n.

1909

NORTHUMBERLAND (DUKE) AND TYNEMOUTH CORPORATION, *In re.*

the date of the obligation to enfranchise to actual payment of the compensation money. If the contention on behalf of the corporation was right, no interest was payable.

Boydell Houghton, for the lord of the manor. The lord is entitled to compensation for the enfranchisement in respect of the loss of the quittances, under s. 96 of the Lands Clauses Act, 1845, which provides that in estimating the compensation "the loss in respect of the fines, heriots, and other services payable on death, descent, or alienation, or any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking, or by the enfranchisement of the same, shall be allowed for." The words "any other matters" include the loss of the quittances. No doubt there is no obligation upon a tenant of the manor to take a receipt for his rent, but if he does take a receipt he must pay the customary quittance of 4*d*. Very few tenants would refuse to take a receipt, which might be the only evidence to shew that they had paid their rents, but the element of uncertainty as to the number of tenants who might refuse to take receipts cannot affect the right to compensation; it can only affect the amount of the compensation. A fine or a heriot is quite as uncertain, and yet s. 96 expressly makes their loss the subject-matter of compensation. These quittances are very common in manors, and the Act 33 Hen. 8, c. 39, s. 65, provides for the payment of 4*d*. to the Crown upon an acquittance for rent in the case of Crown lands. The arbitrator has taken this element of uncertainty into account and has only awarded compensation on the basis of sixteen years' purchase. As Kennedy J. said in *Ashby's Cobham Brewery Co.* (1), "the assessing tribunal must in each case of dispute decide according to the weight of the evidence of competent witnesses." Though the charge of 4*d*. is made by the bailiff, it is so made on behalf of the lord, and the latter is entitled to compensation for the loss thereof. The sum awarded by the arbitrator under this head should therefore stand.

Next with regard to interest. By s. 96 of the Lands Clauses Act, 1845, the promoters of the undertaking must procure the

(1) [1906] 2 K. B. 754, at p. 764.

lands to be enfranchised either within three months after the enrolment of the conveyance or within one month after the promoters shall enter upon and make use of the lands, whichever shall first happen. Though there is no provision in the Act for the payment of interest if the promoters do not comply with the obligation to enfranchise, it is well established in equity that a purchaser taking possession of an estate and retaining the purchase-money must pay interest to the vendor; and this rule has been applied to the purchase of land by a railway company under the Lands Clauses Act, 1845: *Rhys* v. *Dare Valley Ry. Co.* (1) When copyhold land is purchased under s. 95 of the Act the lord continues to receive the fines, rents, heriots, and services until the land is enfranchised, and if during that period the receipt of the fines, rents, and other services is equivalent to the interest on the money payable under s. 96 as compensation for enfranchisement, interest is not payable; otherwise interest is payable: *In re Marquis of Salisbury and London and North Western Ry. Co.* (2) That decision of Jessel M.R. was referred to with approval by Swinfen Eady J. in *Lord Leconfield* v. *London and North Western Ry. Co.* (3) It is for the arbitrator acting upon that principle to say whether interest is payable. Here the arbitrator has found that the lord has been in possession of all manorial rights and all rents have been paid to him, but he has found that the rents are not an equivalent for the interest. The lord is therefore entitled to interest as awarded by the arbitrator.

Lewis Coward, K.C., and *W. Mackenzie*, for the corporation of Tynemouth. Interest upon the compensation money is not payable. In such a case as this interest is only payable where there is a contract, express or implied, to pay it, or where it is made payable by statute, or where the money is wrongfully withheld, and mere delay in taking steps to have the compensation assessed is not a ground for awarding interest on the compensation money for the period before the award is made: *Caledonian Ry. Co.* v. *Carmichael.* (4) As the Lord

(1) (1874) L. R. 19 Eq. 93.
(2) [1892] 1 Ch. 75, n.
(3) [1907] 1 Ch. 38, at pp. 44, 45.
(4) (1870) L. R. 2 H. L. (Sc.) 56.

1909

NORTHUMBERLAND (DUKE) AND TYNEMOUTH CORPORATION, *In re.*

Chancellor said in that case (1), the parties who desire to be paid must suffer if they do not take the proper and usual mode of having that payment ascertained. The arbitrator can only, under s. 96, award compensation for the enfranchisement, and he has no jurisdiction to include in the sum awarded as compensation interest up to the date of the award. The date to which the arbitrator is to look when assessing the compensation is the date when the land ought to have been enfranchised, and if there has been any delay the lord ought to have applied for a mandamus to compel the corporation to proceed to enfranchisement: *Lowther* v. *Caledonian Ry. Co.* (2) In that case there was a delay of twelve years in assessing the compensation for enfranchisement, but Stirling J. (3) only allowed interest upon the sum awarded from the date of the award. Interest before the compensation money is assessed can only be claimed where it is expressly made payable by the Lands Clauses Act, 1845, as, for instance, where the promoters, under the powers of s. 85, enter on the land purchased before the compensation for the land is assessed. The lord has, under s. 95, continued in possession of the rents and manorial services, and there is no reason why he should have interest upon the amount of the compensation money. It is not like the case of a vendor of land who gives up complete possession to the purchaser before payment of the purchase-money, and therefore the decision in *Rhys* v. *Dare Valley Ry. Co.* (4) has no application. That case and the cases upon which it was founded were cases of the purchase and sale of land, and not, as in the present case, cases of enfranchisement of copyhold land. The sole question in the case of *In re Marquis of Salisbury and London and North-Western Ry. Co.* (5) was, as appears from the summons, whether the compensation ought to be assessed on the value of the lands at the time of entry by the company or on their value at the date of the enfranchisement, and no question as to interest was raised. The observation of Jessel M.R., that it is for the valuer to consider whether he will make the company pay interest, or whether the receipt of rents, fines, &c.,

(1) L. R. 2 H. L. (Sc.) 56, at p. 61.
(2) [1892] 1 Ch. 73, at pp. 81, 83, 84.
(3) [1891] 3 Ch. 443, at p. 450.
(4) L. R. 19 Eq. 93.
(5) [1892] 1 Ch. 75, n.

is an equivalent for the interest on the purchase-money, is only a dictum and ought not to be followed. Interest therefore is not payable.

Next, compensation in respect of the loss of the quittances can only be claimed under s. 96 of the Lands Clauses Act, 1845. Under that section compensation is payable for the loss of the fruits of the tenure: *Ecclesiastical Commissioners* v. *London and South Western Ry. Co.* (1) The payment of 4*d.* upon each quittance is a mere voluntary payment, because the tenants are not bound to take receipts when paying their rents, and therefore the payment is not a fruit of the tenure. The payment cannot be legally enforced. It is not an incident of the manor, and it is too uncertain to be taken into consideration in assessing the compensation. [*Cooper* v. *Norfolk Ry. Co.* (2) was also referred to.]

Boydell Houghton did not reply.

PHILLIMORE J. Dealing first with the claim for interest, I do not think that the case of *Caledonian Ry. Co.* v. *Carmichael* (3) touches the point before me. The question in that case arose under a section in the railway company's special Act which provided for payment being made to the owner of a quarry for the value of the stone which he was unable to work owing to the railway passing over the land. A delay of several years occurred, owing to no fault on the part of the railway company, before a jury were summoned to assess the compensation for leaving the stone unworked, and the jury assessed the value of the stone as at the date when the right to compensation accrued. In an action to recover the sum so assessed the landowner claimed to be entitled to interest on that sum from the date when the right to compensation accrued up to the date of the assessment of the sum by the jury. The Court of Session held that he was entitled to interest, but the House of Lords reversed that decision, being of opinion that the landowner was not entitled to interest upon the grounds that to allow interest would be adding to the award of the jury that which the jury had no power to give, and, further,

(1) (1854) 14 C. B. 743. (2) (1849) 3 Ex. 546.
(3) L. R. 2 H. L. (Sc.) 56.

1909

NORTHUMBERLAND (DUKE) AND TYNEMOUTH CORPORATION, *In re.*

Phillimore J.

that even if the jury had the power to give it they had not done so. That was not a case of payment of compensation for the purchase and taking possession of land, and therefore I may put it aside as not having any material bearing upon the present case. Then there is the case of *In re Marquis of Salisbury and London and North Western Ry. Co.* (1) That seems to me to be a very strong authority in favour of the lord. In that case Sir George Jessel was of opinion that the arbitrator ought to have given to the lord, where the enfranchisement had not been completed within the proper period, interest upon the compensation money payable in respect of the enfranchisement from the date when the enfranchisement ought to have been effected to the date of the payment of the compensation money, provided that the receipt of the rents and other manorial services was not an equivalent for the interest. It is true that he does not seem to have dealt specifically with the case where sums less in the aggregate than 4 per cent. have been received by the lord in respect of rents and other manorial services; still it is to my mind clear that the learned judge contemplated that the lord should be paid such a sum for interest as would with the rents, &c., amount to 4 per cent. upon the compensation money. The case of *Lowther* v. *Caledonian Ry. Co.* (2) has no direct bearing upon the question, but indirectly it is of importance in this connection because the case of *In re Marquis of Salisbury and London and North Western Ry. Co.* (1) was referred to, and the decision of Jessel M.R. that the compensation ought to be assessed with reference to the date when the obligation to enfranchise arose was approved of in the Court of Appeal. The last case to which I will refer is that of *Rhys* v. *Dare Valley Ry. Co.* (3), which seems to have a very important bearing upon the question before me, and indeed I am not sure that it does not govern the present case. There Bacon V.-C. applied to the case of a compulsory purchase of land by a railway company the general rule of law applicable as between an ordinary vendor and purchaser, namely, that a purchaser who is let into possession of the land and retains the purchase-money must pay interest at

(1) [1892] 1 Ch. 75, n. (2) [1892] 1 Ch. 73.
(3) L. R. 19 Eq. 93.

the rate of 4 per cent. to the vendor from the date of taking possession until payment of the purchase-money. In the present case the lord has, under s. 95, remained in possession of the rents and all manorial rights, and therefore the corporation have only been partially in possession, and I shall accordingly make an equitable allowance for that. In accordance, therefore, with the view expressed by Jessel M.R. in *In re Marquis of Salisbury and London and North Western Ry. Co.* (1), interest at the rate of 4 per cent. per annum will be payable, but inasmuch as the lord has up to the present time continued to receive the rents, a deduction of the amount of the rents so received must be made from the interest payable upon the compensation money.

It only remains for me to consider the claim for compensation for the loss of the quittances. In old times, when rack rents were not common and when most leases were beneficial leases, some quaint gifts or payments were customarily or usually made by tenants either upon the renewal of their leases or upon rent days; and one can understand that in days when the art of writing was far from universal a person who desired to have a written record of a payment made by him may well have been disposed to pay a small sum to some one who would write it out for him or to the lord who would give it to him. The custom in this manor prescribes that the lord may refuse to give a receipt for a manorial payment unless he is paid 4*d.* for it, but that he may not charge more than that sum. That being the case, it seems to me that this small but fixed charge to a tenant who desires to have documentary evidence of his payment is a natural incident of the manor and comes within the words in s. 96 of the Lands Clauses Act, 1845, "any other matters which would be lost by the vesting of such copyhold or customary lands in the promoters of the undertaking or by the enfranchisement of the same." That in fact the lord will lose these quittance payments is clear. He may not lose all of them by reason of the enfranchisement, because some of the tenants have already refused to pay the 4*d.* for a receipt, preferring to run the risk of having no documentary evidence of the payment rather than pay that small sum. The arbitrator has made allowance for that

(1) [1892] 1 Ch. 75, n.

1909

NORTHUMBERLAND (DUKE) AND TYNEMOUTH CORPORATION, *In re.*

by giving compensation upon the basis of sixteen years' purchase instead of a greater number of years. The award must stand for the amount of the compensation assessed on that basis. Upon both points therefore the award must be in favour of the lord.

Judgment accordingly.

Solicitors for lord: *May, How & Chilver.*

Solicitors for corporation: *Gibson & Weldon, for E. B. Sharpley, Tynemouth.*

W. F. B.

1909

May 6.

NEWSUM, SONS & CO., LIMITED *v.* JAMES.

County Court—Execution—Claim to Goods—Deposit of Value of Goods—Sum deposited less than Value—Bailiff remaining in possession—Right to Possession Fees—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

Goods which had been taken in execution under a county court judgment were claimed by a claimant. The execution creditor did not admit the claim, and the claimant deposited with the bailiff, under s. 156 of the County Courts Act, 1888, the sum of 26*l.*, which was considerably less than the value of the goods claimed, but was more than sufficient to cover the judgment debt and the costs of the execution. The money was paid into Court by the bailiff, who remained in possession of the goods, and an interpleader summons was issued. Before the return day of the interpleader summons the execution creditor gave notice that he admitted the title of the claimant to the goods, and the bailiff withdrew from possession. Upon the taxation of the costs the bailiff claimed possession fees up to the date when the execution creditor admitted the claimant's title, upon the ground that under s. 156 he was bound to remain in possession until the amount of the value of the goods was deposited with him:—

Held, that as the 26*l.* was deposited with and taken by the bailiff under s. 156 of the Act, he must be deemed to have taken it upon the assumption that it represented the amount of the value of the goods, and therefore he had no right to remain in possession or to possession fees after the date of the deposit.

APPEAL from the county court of Surrey, holden at Kingston.

The plaintiffs having recovered judgment against the defendant in the Gainsborough County Court for 17*l.* 4*s.* 3*d.*, debt and costs, a warrant of execution was sent to the Kingston County Court,

within the jurisdiction of which the defendant resided, to be executed against the goods of the defendant for the sum of 18*l.* 12*s.*, being the amount of the judgment debt and the fees in connection with the issue of the warrant. Upon August 20, 1908, the high bailiff of the Kingston County Court levied execution against the goods at the defendant's house, and the goods were claimed by the defendant's wife. Notice of the claim was sent to the plaintiffs, the execution creditors, who in reply sent notice to the high bailiff that they did not admit the claim. The high bailiff also sent notice to the claimant requiring her, in accordance with s. 156 of the County Courts Act, 1888 (1), either to deposit with him the amount of the value of the goods claimed or the costs of keeping possession until the claim was decided, or to give security for the value of the goods, and stating that in default of her making deposit or giving security the goods would be sold and the proceeds paid into Court, to abide the decision of the judge. Upon September 7 the claimant accordingly deposited with the high bailiff the sum of 26*l.* The value of the goods claimed exceeded 80*l.*, but the sum of 26*l.* was more than sufficient to cover the judgment debt and the costs of the execution. The high bailiff paid the sum of 26*l.* into Court, and the goods were not sold, but he remained in possession of them. The high bailiff then took out an interpleader summons, returnable on October 9. The claimant on October 2 delivered particulars of her claim, and the plaintiffs on October 3 filed an admission of the title of the claimant to the goods and gave notice of such admission to the claimant, and thereupon the high bailiff

(1) 51 & 52 Vict. c. 43, s. 156: "Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be affixed by appraisement in case of dispute, to be by such bailiff paid into Court, to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the judge."

1909

NEWSUM, SONS & CO., LIMITED v. JAMES.

withdrew from possession. Upon the return day of the interpleader summons an order was made for payment of the costs of the interpleader proceedings by the plaintiffs, and upon the taxation of the costs by the registrar the high bailiff claimed to be allowed possession fees from September 7 to October 3, when the claimant's title to the goods was admitted. The registrar allowed the possession fees claimed, and upon an application to the county court judge for a review of taxation the judge held, upon the authority of *Miller & Co.* v. *Solomon* (1), that where the money deposited with the bailiff under s. 156 of the County Courts Act, 1888, and paid by him into Court, was not the value of the goods he ought not to withdraw from possession, and that therefore the high bailiff had rightly remained in possession until October 3 and was entitled to possession fees until that date.

The plaintiffs by leave appealed.

Dwyer, for the plaintiffs. The claimant deposited the 26*l.* with the high bailiff under s. 156 of the County Courts Act, 1888, and the high bailiff, having accepted that sum and paid it into Court under that section, must be taken to have done so upon the assumption that it represented the value of the goods claimed, and he cannot afterwards be heard to say that it did not. A "dispute" as to the value of the goods, referred to in s. 156, means a dispute between the claimant and the execution creditor, and not a dispute between the bailiff and the claimant: *Miller & Co.* v. *Solomon*. (1) There was no dispute here between the claimant and the execution creditors, the sum of 26*l.* being assumed to represent, for the purposes of s. 156, the amount of the value of the goods claimed, and, that being so, the high bailiff had no right to remain in possession after September 7, when that sum was deposited with him, and therefore he is not entitled to possession fees after that date. After the 26*l.* had been deposited with the high bailiff and paid into Court the goods became free goods, liable to be taken in execution at the instance of another judgment creditor—*Kotchie* v. *Golden Sovereigns, Ld.* (2)—and therefore the high bailiff had no right

(1) [1906] 2 K. B. 91. (2) [1898] 2 Q. B. 164.

to remain in possession of them. The object of s. 156 is to save the expense of the bailiff remaining in possession until the interpleader proceedings are disposed of, and *Miller & Co.* v. *Solomon* (1) is no authority for the proposition that in such a case as the present the bailiff must not withdraw. The decision of the county court judge was therefore wrong.

J. Scarlett, for the high bailiff. Under s. 156 of the County Courts Act, 1888, it is the duty of the bailiff to remain in possession of the goods until either the amount of the value of the goods claimed is deposited with him or security for their value is given. The bailiff, who is an officer of the Court protecting the goods, is bound to remain in possession if the value of the goods is not deposited with him, and if the amount deposited is not the value of the goods his withdrawal from possession would be wrongful: *Miller & Co.* v. *Solomon.* (1) It is a question of fact in each case whether the sum deposited is the value of the goods claimed, and the county court judge has found that 26*l.* was not the value of the goods.

[JELF J. There was no dispute here between the claimant and the execution creditors that the 26*l.* was deposited with the high bailiff under s. 156 of the County Courts Act, 1888, as representing the value of the goods. Must it not be taken that the high bailiff accepted that sum under that section upon that footing?]

No. There is no provision in Order XXVII. of the County Court Rules, 1903, which is the interpleader order, for giving notice to an execution creditor of the deposit of money with the high bailiff, and as the execution creditors in the present case did not have notice of the deposit of the 26*l.* with the high bailiff, the latter did not know what position they might take up. The particulars of the claim were not then delivered, and the claimant might have been a mortgagee, and the value of the goods might have been sufficient to satisfy the claimant and the execution creditors, and if that were so, and the high bailiff had withdrawn from possession before the full value of the goods had been deposited with him, he might have been liable to an

(1) [1906] 2 K. B. 91.

1909

NEWSUM, SONS & CO., LIMITED v. JAMES.

action at the suit of the execution creditors. The high bailiff did not accept the 26*l.* as the value of the goods, but in his capacity as the officer of the Court levying execution he was bound to pay any money received by him into Court. He was therefore bound to remain in possession until October 3, and he is entitled to possession fees up to that date.

DARLING J. In this case a warrant of execution was issued to the high bailiff of the Kingston County Court to levy by seizure and sale of the defendant's goods the sum of 18*l.* 12*s.* upon a judgment obtained by the plaintiffs against the defendant in the Gainsborough County Court. The high bailiff accordingly seized certain goods at the defendant's house, which were claimed by the claimant. Upon September 7 the claimant, having received notice from the high bailiff that the goods would be sold unless she either deposited with him the amount of the value of the goods or the costs of keeping possession, or gave security for their value, as required by s. 156 of the County Courts Act, 1888, deposited with him the sum of 26*l.* The section only authorized the claimant to deposit with the high bailiff the amount of the value of the goods claimed, and the high bailiff was only justified under that section in taking the amount of the value of the goods. The high bailiff took the 26*l.*, which he had no right to take except upon the assumption that it represented the value of the goods, and he paid it into Court. It then became his duty to withdraw from possession, inasmuch as the money representing the value of the goods was in Court, but, notwithstanding that, he remained in possession from September 7 until October 3, when he received notice that the execution creditors admitted the title of the claimant to the goods. The high bailiff claimed possession fees from September 7 to October 3, and upon the costs coming before the registrar for taxation the execution creditors objected that they ought not to be called upon to pay possession fees after September 7. The registrar overruled this objection and allowed the possession fees up to October 3, and the county court judge, upon an application for a review of taxation upon this point, upheld the decision of the registrar. The execution creditors now appeal to this

1909

NEWSUM, SONS & CO., LIMITED v. JAMES.

Darling J.

Court, and we have to decide whether the high bailiff is entitled to possession fees after September 7.

In my opinion, under the provisions of s. 156 of the County Courts Act, 1888, and upon the authority of *Miller & Co.* v. *Solomon* (1), the high bailiff had no right to remain in possession of the goods after he took the 26*l.* upon the assumption that it represented the amount of the value of the goods. He cannot now be heard to say that that sum does not represent the value of the goods. That being so, he has no right to possession fees after that date. The decision of the county court judge must be reversed, and an order must be made referring the matter back to the county court for a review of taxation upon this point.

JELF J. I am of the same opinion.

Appeal allowed.

Solicitors for plaintiffs: *Sherrard & Sons, for F. G. Tweed, Gainsborough.*

Solicitor for high bailiff: *F. J. Abbott.*

(1) [1906] 2 K. B. 91.

W. F. B.

C. A.
1909
May 4.

[IN THE COURT OF APPEAL.]

HOWES *v.* BISHOP AND WIFE.

Husband and Wife—Joint and Several Promissory Note signed by Husband and Wife for Debt of Third Party—Influence of Husband—Absence of Independent Advice—Liability of Wife.

The plaintiff having obtained judgment against a debtor, it was agreed that the judgment debtor and the two defendants in the present action, who were husband and wife, should give the plaintiff a joint and several promissory note, payable by instalments, for the amount of the judgment. The husband, who had business relations with the judgment debtor, procured his wife's signature to the promissory note, the jury finding that the transaction was sufficiently explained to her and that she knew that the document she was signing was a promissory note, and that she also knew she was incurring a possible liability for the benefit of the judgment debtor in so signing; they also found that her signature was procured by the influence of her husband, but could not agree as to whether it was procured by his undue influence. Default having been made by the judgment debtor in payment of the instalments of the promissory note, the present action was brought against the husband and wife to recover the balance of the instalments of the promissory note. The husband allowed judgment to go by default:—

Held that, notwithstanding the absence of independent advice, the wife was liable upon the promissory note.

Per Lord Alverstone C.J. and Fletcher Moulton L.J.: There is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband and wife, so as to throw on the husband, or on the person who is suing the wife, the onus of disproving an allegation of undue influence.

Per Farwell L.J.: The relation of husband and wife does not come within the equity laid down in *Huguenin* v. *Baseley*, (1807) 14 Ves. 273. *Barron* v. *Willis*, [1899] 2 Ch. 578, approved.

APPEAL of the female defendant, Mrs. Bishop, from a judgment of Jelf J. in favour of the plaintiff. The facts were in substance as follows.

In October, 1907, one Harry Benson was carrying on business as Feltham's Bank, Limited. At that time Howes, the plaintiff in the present action, had recovered judgment against Benson for an amount which the latter was unable to pay without

assistance, and negotiations took place between Benson and Dr. Bishop, the other defendant in the present action, who had business relations with Benson, as to the mode in which assistance should be rendered. In the result it was arranged that a joint and several promissory note should be given to the plaintiff by Benson and by Dr. and Mrs. Bishop, the defendants in the present action, to secure the amount of the judgment. Accordingly a document was prepared by the plaintiff's solicitors which was in the following form:—"We, the undersigned, for valuable consideration received, jointly and severally promise to pay to Nathaniel Howes or bearer at [the office of the plaintiff's solicitors] the sum of 1166*l.* 13*s.* 4*d.* by forty-six instalments of 25*l.* each and one final instalment of 16*l.* 13*s.* 4*d.* on the 28th day of each month, the first of such instalments being payable on October 28, 1907, and the last of such instalments, viz. 16*l.* 13*s.* 4*d.*, being payable on August 28, 1911, and provided that if default shall be made in payment of any one instalment, the whole of the balance of the said instalments will forthwith become due and payable." This document, which was dated October 15, 1907, was sent by the plaintiff's solicitors to Benson with instructions to him to procure the signatures of Dr. Bishop and his wife, and Dr. Bishop took it to his wife and eventually obtained her signature to it. Evidence was given by Mrs. Bishop as to the circumstances under which she signed the document, but Dr. Bishop was not called as a witness. Certain questions were put to and answered by the jury, which are detailed below. On October 22, 1907, the plaintiff's solicitors wrote to tell Mrs. Bishop that they held a joint and several promissory note (which was the document in question) on behalf of Howes, and on October 28, 1907, they wrote to her that they had that day received 25*l.* from Benson, and that the next instalment was due on November 28. The jury found that both these letters were received by Mrs. Benson, although she denied their receipt. Ten instalments were paid by Benson, but default was made by him in payment of the instalment due on August 28, 1908. On September 7, 1908, the writ was issued in the present action against Dr. and Mrs. Bishop as makers of a joint and several promissory note, the amount claimed being 917*l.* 13*s.* 4*d.*,

C. A. 1909

HOWES v. BISHOP.

which included interest to date of writ. Judgment was eventually signed against Dr. Bishop in default of appearance, but, upon an application of the plaintiff for leave to sign summary judgment, leave to defend was given to Mrs. Bishop, and the action was placed in the Order XIV. list; it was therefore tried without pleadings.

At the trial before Jelf J. and a common jury evidence was given by Mrs. Bishop that when she signed the document she was ignorant of its nature, that the document was never explained to her, that she had no independent advice, and that she signed it under the pressure and owing to the undue influence of her husband; a witness was called to corroborate some portions of her evidence. Neither Benson nor Dr. Bishop was called for the defence.

The following are the questions left by Jelf J. to the jury, with their answers:—

1. Was Mrs. Bishop's signature to the promissory note obtained from her by Dr. Bishop by duress?—No.

2. Was it so obtained by fraudulent misrepresentation or by fraudulent concealment of material facts?—No.

3. Was it so obtained by undue influence? (This question was not answered.)

4. Did the plaintiff's solicitors send the promissory note to Benson for him to sign, and to obtain the signatures of Dr. and Mrs. Bishop?—Yes.

5. Was the substance of the transaction sufficiently explained to Mrs. Bishop?—Yes.

6. Did Mrs. Bishop know when she signed the promissory note that it was a note or bill?—Yes.

7. Did she know when she signed the promissory note that she was incurring a possible liability for the benefit of Benson and with a consideration or benefit to her husband?—Yes.

8. Did Mrs. Bishop receive (*a*) the letter of October 22, 1907, $\frac{\text{and}}{\text{or}}$ (*b*) the letter of October 28, 1907?—Yes.

The jury further said, in answer to the third question, that they were agreed that the signature of Mrs. Bishop was obtained by the influence of her husband, but that they were not agreed as to undue influence.

Upon these findings Jelf J. gave judgment for the plaintiff on further consideration.

The defendant Mrs. Bishop appealed.

McCall, K.C., and *Schiller*, for the defendant. The defendant is entitled to judgment. Under the circumstances, the onus was on the plaintiff of shewing that the wife knew the effect of the document she was signing, and that she had independent advice: *Chaplin & Co.* v. *Brammall* (1), a case on all fours with the present. It is true that the jury found that the document was sufficiently explained to the defendant and that she understood it, but those findings were against the weight of the evidence, there being on this point no evidence called to contradict that of the defendant herself. In *Huguenin* v. *Baseley* (2) the rule was clearly enunciated that, where a person who is in a position to exercise undue influence upon another obtains from that other a voluntary benefit which is to the latter's prejudice, the transaction will be set aside, unless he can shew that the donor understood the transaction and that no undue influence was exercised. That decision was followed by Lord Romilly M.R. in *Cooke* v. *Lamotte* (3) and in *Hoghton* v. *Hoghton* (4), in which latter case a disentailing deed was set aside on the ground of undue influence of a father upon his son. Lord Romilly had an opportunity of again considering these decisions in *Cobbett* v. *Brock* (5), and it may be inferred from his observations that in his opinion the rule applied to husband and wife. The relation of husband and wife is within the rule in *Huguenin* v. *Baseley*. (2) This was held in explicit terms by Lord Penzance in *Parfitt* v. *Lawless* (6), where, in enumerating the various relations to which the rule applied, he included that of husband and wife. Here there was evidence of influence by the husband, and no evidence that it was not undue (for that is the effect of the jury's not answering the third question), and as the wife had no independent advice, the plaintiff cannot recover, for the onus

(1) [1908] 1 K. B. 233.
(2) 14 Ves. 273.
(3) (1851) 15 Beav. 234.
(4) (1852) 15 Beav. 278.
(5) (1855) 20 Beav. 524, at p. 530.
(6) (1872) L. R. 2 P. & M. 462, at p. 468.

C. A. 1909

HOWES v. BISHOP.

affects not merely the person using undue influence, but third parties claiming under him: *Berdoe* v. *Dawson*. (1)

[LORD ALVERSTONE C.J. Do you contend that, even if the action were undefended, the plaintiff must give evidence of the absence of undue influence before he could recover?]

Yes; that is the proper inference from the authorities, for it is clear that the defendant was entitled to a complete explanation of the nature and effect of the instrument she was signing, and also to independent advice.

[FARWELL L.J. I do not see how, at any rate since the Married Women's Property Act, 1882, the rule in *Huguenin* v. *Baseley* (2) can be said to cover the relation of husband and wife.]

That Act does not affect the equitable rules governing that relation. The question of the applicability of the rule in *Huguenin* v. *Baseley* (2) was considered by Wright J. in *Bischoff's Trustee* v. *Frank* (3), which was reversed by the Court of Appeal on the facts only and is not reported in that Court. There Wright J. held that, where a large voluntary benefit was given by a wife to her husband, influence on the part of the husband must be presumed, and that the onus of proving the absence of undue influence lay upon the donee, an onus which, in the absence of evidence that the wife had received independent advice, he had not discharged. The question whether the relation of husband and wife comes within the rule in *Huguenin* v. *Baseley* (2) depends upon the circumstances of the particular case.

[FARWELL L.J. No; it is a rule of equity, and depends not on circumstances, but on the relation of the parties.]

In any event the defendant is entitled to a new trial. The verdict was against the weight of evidence, and the learned judge misdirected the jury in telling them (inter alia) that it was an ordinary commercial transaction, and that it lay upon the defendant to establish a case which would enable her to get out of the consequences of affixing her signature to the document.

Low, K.C., and *Morle*, for the plaintiff, were not called upon.

(1) (1865) 34 Beav. 603. (2) 14 Ves. 273.
(3) (1903) 89 L. T. 188.

LORD ALVERSTONE C.J. The appellant is a married woman who is sued together with her husband upon a joint and several promissory note given by them. The husband suffered judgment to go against him by default, and, upon the findings of the jury at the trial, judgment has been given against the wife. Eight questions were put to the jury, and the material answers are those to questions 1, 2, 3, 5, 6, and 7. Upon the findings it has been contended on behalf of the appellant that, regard being had to the fact that she is a married woman who entered into this transaction as surety for her husband and undertook a liability on his behalf from which no benefit could result to herself, there is a rule which prevents the judgment against her from standing, upon the ground that the plaintiff has not discharged the onus of shewing that the defendant, a married woman, had had the proceeding adequately explained to her, or had had independent advice or sufficient protection. I must not be understood to be laying down a rule that in no case where a wife acts on her husband's instructions and under his influence is it necessary to shew that she has received independent advice. There may be circumstances where the mere signature of the document by the married woman is not of itself sufficient to render her liable upon it, but in my opinion there cannot be a general rule of universal application that the rules of the Courts of Equity as to confidential relationships necessarily apply to the relation of husband and wife.

I will briefly refer to the principal authorities. In *Parfitt* v. *Lawless* (1) Lord Penzance said: "In equity persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions when transactions between them are brought in question." It is true that in that passage the learned judge mentioned husband and wife as in the same category as the other relations which he named: he was there referring to the equitable doctrine, and placed husband and wife in the same position as other relations to which that doctrine undoubtedly applies; but it is no part of his decision in the case,

(1) L. R. 2 P. & M. 462, at p. 468.

C. A. 1909

HOWES v. BISHOP.

Lord Alverstone C.J.

and must be considered as a dictum introduced by him while enunciating the general principle. There is, however, an authority which negatives the accuracy of the generality of that statement and also negatives the broad argument on behalf of the present appellant. In *Barron* v. *Willis* (1) Cozens-Hardy J. said: "It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* (2) applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband, and prepared by the husband's solicitor, is invalid. The onus probandi lies on the party who impugns the instrument, and not on the party who supports it. This was clearly decided by Sir James Parker in 1852 in *Nedby* v. *Nedby* (3), and it accords with what Lord Hardwicke said in *Grigby* v. *Cox.* (4)" Whether that is right or wrong, it is an authoritative expression of opinion by a learned judge of great experience in that branch of the law, and is far more weighty than the general statement of Lord Penzance. That view derives support from other authorities. In *Turnbull & Co.* v. *Duval* (5) Lord Lindley, in delivering the judgment of the Privy Council, said: "Their Lordships are of opinion that it is quite impossible to uphold the security given by Mrs. Duval. It is open to the double objection of having been obtained by a trustee from his cestui que trust by pressure through her husband and without independent advice, and of having been obtained by a husband from his wife by pressure and concealment of material facts. Whether the security could be upheld if the only ground for impeaching it was that Mrs. Duval had no independent advice has not really to be determined. Their Lordships are not prepared to say it could not. But there is an additional and even stronger ground for impeaching it." For this reason I think that there may be circumstances in which the equitable doctrine that the onus of proof rests on the person supporting the document which creates a gift inter vivos would apply to the relationship

(1) [1899] 2 Ch. 578, at p. 585.
(2) 14 Ves. 273.
(3) (1852) 5 De G. & Sm. 377.
(4) (1750) 1 Ves. Sen. 517.
(5) [1902] A. C. 429, at p. 434.

of husband and wife, but I am not prepared to assent to the contention that the relationship necessarily comes within the application of the doctrine; on this point I think that the view of Cozens-Hardy J. in *Barron* v. *Willis* (1) was quite right.

Then it is contended that this case is governed by the decision of the Court of Appeal in *Chaplin* v. *Brammall* (2); but in that case there was a finding that the wife's signature was obtained without sufficiently informing her of, and explaining to her, the contents of the document, and that she did not understand it when it was signed by her. It is obvious that those facts give rise to very different considerations. Then there is the case of *Bischoff's Trustee* v. *Frank* (3), a decision of Wright J., which is said to be an authority in favour of the defendant's contention; but the remarks of the members of the Court of Appeal in their unreported decision negative the idea that they adopted any such principle. During the argument of that case Collins M.R. made the following remarks: "It seems to me that the burden is upon the lady in this case, and, the facts standing as they do, her evidence is worth nothing. . . . . The burden is thrown upon you to shew that there is some element, with which, I think, you must connect the plaintiff, to fraudulently induce this lady to give a guarantee." It seems to me that, if the presumption and rule of law suggested by the defendant had applied, the language of Collins M.R. would have required considerable qualification. And Romer L.J. said: "It seems to me a simple confusion of principles; it has nothing to do with the equitable principle at all. . . . . The learned judge says that the husband is to be treated as a voluntary donee from the wife, because the wife was going to guarantee the husband's debts. That being so, the plaintiff must be taken as a person who knows that, and therefore has the onus of proving that there was no undue influence. I never heard of such a thing. . . . . Far from there being any notice of any undue influence being exercised by the husband on the wife and that being known to the plaintiff in this case, there was no undue influence at all in fact; if you look at her evidence, she says that the only influence was the ordinary influence that a

(1) [1899] 2 Ch. 578. (2) [1908] 1 K. B. 233.
(3) 89 L. T. 188.

C. A. 1909

HOWES v. BISHOP.

Lord Alverstone C.J.

husband has on a wife. Unless you try to make out that, whenever a wife wishes to help her husband with regard to borrowing money, the creditor is to assume undue influence, you cannot maintain such a proposition. . . . . If you say she was influenced by the fact that her husband wanted money, I agree she was; but that is not undue influence." (1) This language is, in my opinion, inconsistent with the broad contention that the plaintiff has not proved what it is incumbent on him to prove in order to establish the defendant's liability.

There is a further difficulty in the way of the appellant. It cannot be suggested that proof of the facts cannot be given by the evidence of the wife. She was called, and told a story which on the face of it was difficult of belief; and she was cross-examined as to certain statements undoubtedly made upon her instructions, for they could not have been invented by her solicitor. If the jury disbelieved her evidence, and thought that she knew that the bills were for the benefit of her husband and Benson, what further evidence was it necessary for the plaintiff to give in order to discharge the onus which lay upon him? There was evidence of the facts which it is suggested the plaintiff ought to prove, and I do not feel that I am forced to say that the plaintiff has not discharged that onus when the jury disbelieved the lady's statement that she did not know she was signing a promissory note. No evidence was given of duress or fraudulent concealment, and the jury found that the wife knew that she was signing a promissory note and that the transaction was fully explained to her. I think, therefore, that the plaintiff is entitled to recover.

It is further suggested that the learned judge misdirected the jury; but there was a very careful summing up, and, assuming that the defendant's main contention is wrong, I can see no ground for suggesting that there was any misdirection. Then it was said that, although the jury agreed that the wife's signature to the promissory note was obtained by the influence of the husband, they did not agree as to whether it was obtained by his undue influence, and that there should be a new trial; but we certainly ought not, in view of all the circumstances, to

(1) These extracts are taken from a shorthand note of the argument.

order a new trial on that ground, especially as there was in the opinion of Jelf J. no evidence of undue influence fit for the consideration of the jury.

FLETCHER MOULTON L.J. I am of the same opinion. There was no misdirection, and the jury answered seven out of the eight questions put to them. What is the effect of their not answering the question as to the husband's undue influence and of any possible misdirection as to it? I am of opinion that the ruling in *Barron* v. *Willis* (1) is correct, and that the relation of husband and wife is not necessarily brought within the equitable principle laid down in *Huguenin* v. *Baseley* (2); but it is not necessary in the present case to decide any such general proposition. We have to decide on whom proof of the issue as to undue influence lay, looking to the answers of the jury, and I have no hesitation in saying that, if the defendant desires to get out of such a transaction as is found in those answers, she must prove that her acts were controlled by the undue influence of her husband. Of any such undue influence there was, as Jelf J. held, no evidence whatever.

FARWELL L.J. I am of the same opinion, but I go further than the other members of the Court. Taking the findings of the jury (which I accept), the defendant could only succeed if the relation of husband and wife came within the equity laid down in *Huguenin* v. *Baseley*. (2) I am of opinion that it does not come within it. What is that equity? It was discussed in *Allcard* v. *Skinner* (3), where Lindley L.J., in considering the ambit of that principle and the authorities upon it, said: "The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been

(1) [1899] 2 Ch. 578. (2) 14 Ves. 273.
(3) (1887) 36 Ch. D. 145, at p. 181.

C. A. 1909

HOWES v. BISHOP.

Farwell L.J.

considered necessary to shew that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made." In *Powell* v. *Powell* (1) I myself said, in the course of my judgment, "On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee in the way that I have just stated."

If the rule in *Huguenin* v. *Baseley* (2) applied to the relation of husband and wife, it would be sufficient to say that the wife in the present case had no independent advice, and the contention of the defendant would be right; but I think that the authorities shew that it does not so apply. I think that the correct view was taken by Cozens-Hardy J. in *Barron* v. *Willis* (3), where he says: "It is also settled by authority which binds me, although text-writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those to which the doctrine of *Huguenin* v. *Baseley* (2) applies." In support of that view he referred to the judgment of Lord Hardwicke in *Grigby* v. *Cox* (4), which was a case where a wife had conveyed part of her separate estate to a purchaser without her trustees joining in the conveyance, and where improper influence on the husband's part was alleged but not proved. Lord Hardwicke there said: "For the rule of the Court is, that where anything is settled to the wife's separate use, she is considered as a feme sole; may appoint in what manner she pleases; and unless the joining of her trustees with her is made necessary, there is no occasion for that. And this will hold, though the act done by the wife is in some degree a transaction alone with the husband: although in that case a Court of Equity will have more jealousy over it: and therefore if there is any proof that the husband had any improper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the Court might set it aside: but not without that. The wife might have made an immediate appointment for the benefit of her husband; which would have stood, unless some

(1) [1900] 1 Ch. 243, at p. 246.
(2) 14 Ves. 273.
(3) [1899] 2 Ch. 578, at p. 585.
(4) 1 Ves. Sen. 517.

such proof as before mentioned." That view was followed in *Nedby* v. *Nedby* (1) by Parker V.-C., who said: "The wife is placed, by the will which created the power, in the position of a feme sole, with power to dispose of the property by a deed duly executed, the protection to her being, that the act of appointment was to be by a deed duly executed: so that she had the protection afforded by the formalities required for the execution of the power. Upon all the principles of this Court the appointment is good, unless the plaintiffs claiming adversely to it shall shew sufficient reasons to the contrary. This is the principle plainly to be deduced from the observations of the Court in *Grigby* v. *Cox* (2), although, as was said in that case, 'the Court will have more jealousy over such a transaction.' What, then, were the circumstances in this case? The Master has found in substance that the deed was prepared by the husband's solicitor, and was executed by the wife in the presence of two of the clerks of the solicitor, and that it was not read over to her. These are circumstances which constantly occur in ordinary transactions; and it would be dangerous to say that the deed could not be supported on such grounds. The only other circumstance upon which I am asked to set aside this deed is, that Williams, one of the witnesses attesting Mrs. Nedby's execution of the deed, has deposed that she was agitated and distressed, and signed it in a reluctant manner. It is impossible to act upon this evidence as a ground for setting aside the deed." I think that the authorities which I have cited are conclusive to shew that the present Master of the Rolls was right when he said in *Barron* v. *Willis* (3) that the relation of husband and wife was not one of those to which the doctrine of *Huguenin* v. *Baseley* (4) applied.

The defendants referred in argument to *Bischoff's Trustee* v. *Frank* (5), a case tried before Wright J. and not reported on appeal. In that case a husband had obtained from his wife a guarantee in favour of a trade creditor, and the learned judge held that the relation of husband and wife was one where, in the case of a large voluntary benefit, influence on the part of the

(1) 5 De G. & Sm. 377, at p. 383.
(2) 1 Ves. Sen. 517.
(3) [1899] 2 Ch. 578.
(4) 14 Ves. 273.
(5) 89 L. T. 188.

C. A. 1909

HOWES v. BISHOP.

Farwell L.J.

husband was presumed to exist, and that in the absence of independent advice to the wife the burden upon the donee of shewing the absence of undue influence had not been discharged. In coming to that conclusion he relied largely upon *Turnbull & Co.* v. *Duval* (1), which, however, is in my opinion no authority for the proposition; the facts are altogether different. That was not a simple case of a husband obtaining a document from his wife; it was also a case where the document had been obtained by a trustee from his cestui que trust by means of pressure and the concealment of material facts: the case does not assist us. The defendant also relied upon the recent case of *Chaplin & Co.* v. *Brammall.* (2) But in that case Vaughan Williams L.J. said, with reference to the facts, "Ridley J. has come to the conclusion that in fact no sufficient explanation of it was given to her, and that she did not understand it." On those facts that case was a perfectly plain one, and I fail to see why it was reported.

In my opinion it is impossible now to extend to the relation of husband and wife a doctrine which was devised many years ago for other purposes, and which has never yet been applied to that relation. The only case which in any way supports the defendant's contention is *Parfitt* v. *Lawless* (3), but Lord Penzance's statement on the subject was a dictum only. The learned judge was not deciding a case where any pressure or undue influence was alleged to have been used by a person standing in any kind of fiduciary relation to another; he was referring to the doctrine of equity in regard to such relations, and he made a slip in his recollection of the scope of the equitable doctrine. Upon principle, it is clear that business could not go on if in every transaction by way of gift by a wife to her husband the onus were on the husband to shew that the wife had had independent advice; such a position would render married life intolerable. In *Caton* v. *Rideout* (4) Lord Cottenham laid it down that a wife could not recall, or obtain any account of, her past separate income paid to her husband with her assent, a doctrine that is inconsistent with the application of the rule of

(1) [1902] A. C. 429.
(2) [1908] 1 K. B. 233.
(3) L. R. 2 P. & M. 462.
(4) (1849) 1 Mac. & G. 599.

Huguenin v. *Baseley* (1) to the case of husband and wife. It is impossible now to extend the equitable doctrine to that relation.

C. A. 1909

HOWES v. BISHOP.

Appeal dismissed.

Solicitors for plaintiff: *Wickes & Knight.*
Solicitors for defendant: *Broad & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A. 1909 *May* 19.

HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY COMPANY.

Railway Company—Level Crossing—Highway—Road raised to Level of Railway —Approaches to Crossing—Repair of Roadway of Approaches.

A railway company, being authorized to carry their railway across a high road on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined "approaches" on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the company to repair the roadway upon the approaches:—

Held, that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the high road, an obligation to keep in repair the roadway upon the whole of the approaches, including those portions which lay outside the fences of the railway.

Judgment of Jelf J., [1909] 1 K. B. 368, affirmed.

APPEAL from the judgment of Jelf J. upon a special case stated by consent of the parties. (2)

The plaintiffs' claim in the action was for a declaration that the defendants were bound to maintain and keep in repair the highways over certain level crossings of the defendants' railway in the county of Hertford near Sawbridgeworth Station, near Spellbrook Hamlet, and near South Mill, Bishop's Stortford, respectively, including all the approaches on either side of such crossings, and for a mandatory order enjoining them from time to time to make such repairs as might be necessary.

(1) 14 Ves. 273. (2) [1909] 1 K. B. 368.

C. A. 1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

The plaintiffs are the highway authority responsible for the repair of the main roads in the county of Hertford. Amongst other main roads for which they are responsible are the roads which are crossed by the defendants' railway at the level crossings above mentioned.

The Northern and Eastern Railway Company were authorized to construct the said railway by a special Act of Parliament passed in the year 1836 (6 & 7 Will. 4, c. ciii.) (1), and constructed it in accordance with the provisions of that Act so as to cross the said highways at the places specified by means of level crossings.

In the course of constructing the parts of the railway at the said level crossings the company made their railway (including the permanent way and ballasting) at a higher level than that of the original highways respectively crossed by the railway, and, in order to bring the highways respectively up to the level of the railway, and to render the highways continuous and without interruption from a difference in level between the railway and the original levels of the adjoining lengths of highways, and to restore their use, raised the adjoining portions of highways respectively on either side of the railway. These portions of the highways, herein referred to as the "approaches," were respectively raised for the lengths and to the heights as follows:—

Sawbridgeworth level crossing.—The approach on one side of the railway was 174 ft. long, rising in that distance 3ft. 9 in., while that on the other side was 152 ft. long, rising 2 ft. 6 in.

Spellbrook level crossing.—The approach on one side was 60 ft. long, rising 4 ft. 3 in.; that on the other side was 80 ft. long, rising 4 ft. 5 in.

South Mill level crossing.—The approach was on one side 365 ft., rising 9 ft. 9 in., and that on the other side 355 ft., rising 10 ft. 10 in.

The company erected gates by the side of the railway at each side of the said level crossings respectively.

The railway has become vested by purchase in the defendants, who are bound by all the obligations and subject to all the liabilities of the Northern and Eastern Railway Company.

(1) See note on p. 413, post.

The defendants and their predecessors have always maintained and kept in repair those portions of the respective highways lying inside of and between the gates above mentioned, and the defendants admit their liability to maintain and repair these parts.

The said approaches and the highways thereon lying outside the gates have been kept in repair and maintained by the defendants and their predecessors until shortly before this action, when the defendants ceased so to do and disputed their liability to do it.

The question for the opinion of the Court was whether the defendants were bound to repair and keep in repair the said approaches and the highways thereon.

Jelf J. answered the above question in the affirmative, and accordingly gave judgment for the plaintiffs. (1)

J. E. Bankes, K.C. (*Courthope-Munroe* with him), for the defendants. The doctrine which Jelf J. applied in this case is not properly applicable to it. That doctrine correctly stated is that, where persons are authorized by statute to cut through or interfere with a public highway for their own benefit, and there is nothing in the statute inconsistent with that implication, it must be implied, in the absence of express provision, that the authority was given to them subject to the condition that they would not only make but also maintain an equally convenient mode of passage for the public. This is spoken of as a common law doctrine, but, in truth, in all the cases which are relied upon by the learned judge, the question was as to the necessary implication from the terms of the particular statute. In the present case the suggested implication is inconsistent with the terms of the special Act. If the doctrine relied upon by the plaintiffs were applicable in the present case, it would be equally applicable in the case of a railway to which the Railways Clauses Consolidation Act, 1845, applied, whereas it was held by Wright J. in *West Lancashire Rural Council* v. *Lancashire and Yorkshire Ry. Co.* (2) that such a railway company was not in a case like the present liable to repair the approaches to a level

(1) [1909] 1 K. B. 368, at p. 374. (2) [1903] 2 K. B. 394.

C. A. 1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

crossing. The special Act under which this railway was made was one of the earliest railway Acts, and, at the time when it was passed, it was contemplated that a railway should be in the nature of a public highway, upon which the public might run their own carriages. The matter therefore would then be considered by the Legislature as one involving not so much an obstruction of a public highway as the making of provisions for the crossing of one public highway by another. It is submitted that this case must turn entirely on the terms of the special Act, the question being whether, on a consideration of its provisions as a whole, the intention of the Legislature was that the company should be under an obligation to maintain the approaches to a level crossing under such circumstances as exist in the present case. In the defendants' special Act there are various sections—e.g., ss. 14, 31, 102, 104—in which it is expressly provided that the company shall "maintain" works as well as make them, thus shewing that the Legislature, in framing the Act, had in their contemplation the distinction between "making" and "maintaining." The natural inference is that, where the Act provides for the doing of any work by the company, and says nothing about subsequently maintaining the same, it was not intended that the obligation of maintaining it should be imposed on the company. The interests of the public and the highway authorities in respect of highways were intended to be safeguarded by s. 102, which provides that the company shall not carry their railway across a highway on the level without the previous consent of two justices. It was assumed, no doubt, by the Legislature that the public would be protected by the obligations, if any, which the justices might think fit to impose as a condition of their consent to the railway so crossing the highway. That section expressly provides that the company shall "maintain" the approaches where a public bridleway or footpath is crossed otherwise than on a level, but there is no similar provision as to maintenance of approaches in the case of a level crossing. This level crossing must be assumed to have been properly made under the Act, all necessary consents having been obtained. By s. 109 the company may, with the consent of the highway authority, alter a highway; and by s. 111, where the

company cut through or raise a road they must make an equally convenient road for the public. Whether this crossing must be looked upon as an alteration of a road under s. 109 or as being a substituted road under s. 111, in neither of those sections is there any obligation imposed on the company to repair the road subsequently. [He cited and discussed the following cases (1):—*Rex* v. *Inhabitants of Kent* (2); *Rex* v. *Inhabitants of the Parts of Lindsey* (3); *Inhabitants of West Riding of Yorkshire* v. *the King* (4); *Abbot of Coombe's Case* (5); *Rex* v. *Kerrison* (6); *Reg.* v. *Inhabitants of Isle of Ely* (7); *North Staffordshire Ry. Co.* v. *Dale* (8); *Leech* v. *North Staffordshire Ry. Co.* (9); *London and North Western Ry. Co.* v. *Skerton* (10); *Waterford and Limerick Ry. Co.* v. *Kearney* (11); *Fosberry* v. *Waterford and Limerick Ry. Co.* (12); *Oliver* v. *North Eastern Ry. Co.* (13); *Lancashire and Yorkshire Ry. Co.* v. *Corporation of Bury.* (14)]

Danckwerts, *K.C.*, and *R. D. Muir*, for the plaintiffs, were not called upon to argue.

LORD ALVERSTONE C.J. This appeal raises the question whether a railway company is under an obligation to repair the inclined approaches to certain level crossings on their railway. This railway was constructed under a special Act which was passed in the year 1836. The railway was, at the place where it crossed each of the highways in question, made at a considerably higher level than that of the highway as it originally existed at that place; and, inasmuch as the railway would otherwise have formed an impassable barrier to the passage of traffic along the highway, inclines had to be made on each side of the line extending back for some distance, in order that the roadway might be carried up to the level of the railway.

(1) The cases cited were fully discussed in the Court below. See [1909] 1 K. B. 368.
(2) (1811) 13 East, 220.
(3) (1811) 14 East, 317.
(4) (1813) 5 Taunt. 284.
(5) (1370) Lib. Ass. 43 Edw. 3, pl. 37.
(6) (1815) 3 M. & S. 526.
(7) (1850) 15 Q. B. 827.
(8) (1858) 8 E. & B. 836.
(9) (1860) 29 L. J. (M.C.) 150, at p. 152.
(10) (1864) 5 B. & S. 559.
(11) (1860) 12 Ir. C. L. R. 224.
(12) (1862) 13 Ir. C. L. R. 494.
(13) (1874) L. R. 9 Q. B. 409.
(14) (1889) 14 App. Cas. 417.

C. A. 1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

Lord Alverstone C.J.

Therefore, although there was in the railway sense of the term a "level crossing," the roadway had to be raised in order to cross the railway on the level. For seventy years the company have repaired these approaches, but they now deny their liability to repair them, although they admit that they are liable to maintain and repair so much of the roadway as lies between the gates on either side of the line. It is not clearly stated on what view of the law or the facts that admission is based. The defendants' counsel suggested that, the company having to repair the portion of the road that lay between the rails, they could not practically do that without repairing the road up to the gates. It might perhaps be difficult, if the matter were argued out, for the company to reconcile this admission with their non-liability to repair the approaches. I do not, however, propose to draw any inference unfavourable to the defendants from that admission.

The learned judge in the Court below has accepted as applicable to this case the principle which has been acted on in a number of cases, namely, that, where under a statutory authority a body of persons have interrupted a public highway, and there is a duty imposed on them to make some means of communication for the purpose of restoring the continuity of the highway, there is also involved a duty on the part of that body to keep the substituted means of communication in repair. That principle has been approved of in such a long series of cases that it would be quite impossible for us now to overrule it. The defendants' counsel, however, contends that this common law principle cannot be applied to this case, because there are sections of the special Act under which this railway was made which are inconsistent with its application, and that the whole matter must be governed by the special Act. He further relies by way of analogy upon the fact that it has been held that, under the Railways Clauses Consolidation Act, 1845, the obligation of the railway company with regard to the repair of approaches does not extend to a case where a railway crosses a highway by means of a level crossing as in the present case; and therefore, he contends, we ought to construe the sections of the special Act in this case so as to exclude the operation of the common law doctrine to which I have referred. Assuming, as I think I may, that the common

law doctrine on this subject, which has been acted on and recognized for many years, may now be taken to be well settled, I do not propose to go through the series of cases cited, such as *Rex* v. *Inhabitants of Kent* (1), *Rex* v. *Inhabitants of the Parts of Lindsey* (2), and *Rex* v. *Kerrison.* (3) In those and many other cases the broad principle has been adopted that, where persons, acting under statutory authority, for their own benefit interfere with some existing public convenience, such as a highway or a ford, and are by the statute bound to provide some substitute for the convenience so interfered with, such persons, although there is no express provision in the statute to that effect, are, nevertheless, under the further obligation of keeping the substituted convenience in repair, as for instance in the case of the structure of a bridge erected in substitution for a public ford.

Adopting that principle, with regard to which I have really nothing to add to the observations of Jelf J., I proceed to deal with the question whether the defendants' counsel is right in saying that the language of the special Act in the present case ought to be construed so as to exclude it. The first section relied upon by him to which I need refer is s. 31 of the special Act. That section, which, after all, has only a very indirect, if any, bearing on the question before us, empowers the company for the purpose of making the railway to enter on lands, and, among other things, "to divert or alter the course of any roads or ways or to raise or sink any roads or ways in order the more conveniently to carry the same over, under, or by the side of the said railway." I do not think, though perhaps it is not very important, that these latter words of the section contemplate cases where the railway crosses the road by a level crossing. Then reference was made to s. 102, which provides specifically for cases in which it is proposed to cross roads on the level. That section provides that the said railway shall not be made across any street or highway or public bridleway or footpath on the level without the previous consent in writing of two justices; and it further provides that, where the said railway crosses any public bridleway or footpath in any other manner than on the level, the

(1) 13 East, 220. (2) 14 East, 317.

(3) 3 M. & S. 526.

C. A. 1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

Lord Alverstone C.J.

company shall make and maintain convenient ascents and descents, as the case may be, to such bridleway or footpath. That section was relied upon as providing expressly for the maintenance of ascents and descents in cases where the railway crosses a bridleway or footpath otherwise than on the level. It was suggested with regard to s. 104 that it really covers only the same ground as s. 102, and must have been allowed to remain in the Act by some mistake. It is really not necessary to consider whether that is so or not, because the argument upon which the defendants' counsel relies arises upon both of these sections alike. Then reliance was placed upon the provisions of s. 105 with regard to the crossing of turnpike roads. All these sections, however, appear to me to do no more than provide for the special matters therein referred to, namely, the making of the railway across a highway on the level, and the ascents and descents to be made and maintained in cases where the crossing of a bridleway or footpath is otherwise than by a level crossing. In my opinion these sections do not really help the defendants' contention ; and the provisions as to the last-mentioned cases give rise to the observation that it is not easy on principle to see why, if in those cases the approaches are to be repaired by the company, they should not also be repaired by them in a case like the present. Then ss. 109 and 111 were referred to by the defendants' counsel as having an important bearing upon the present question. By s. 109 the company may, with the consent of the highway authority, make alterations in a road; and by s. 111 it is provided, in substance, that in all cases where, in the exercise of any of the powers given by the Act, it is found necessary that any part of any carriage or horse road should be cut through, raised, and taken, the company shall, at their own expense, cause another good and sufficient road (as the case may require) to be set out and made instead thereof as convenient for passengers and carriages as the said road so to be cut through, raised, and taken, or as near thereto as may be ; and, where the road in question is a turnpike road, the substituted road, if temporary, is to be set out and made, and the principal road restored within a certain limited time. That section appears to contemplate that there will be cases in which the interference with the road

will be temporary only, and to impose upon the company the obligation in such cases of providing a temporary substitute for the original road until that road is restored. But, assuming that the case is not one of a merely temporary obstruction, but of the permanent substitution of a piece of road for part of the original road—and I think it must be taken that there is such a substitution where the piece of road constructed by the company is on a different level from that upon which the road there originally was, and there are gradients up to and down from the level of the line—it seems to me impossible to contend that there is anything in the terms of that section which, in the case of a piece of road so constructed by the company, could have the effect of excluding by implication the operation of the common law principle to which I have referred. It appears to me that, where under that section the company has cut through a public road, and substituted for it at that point a different road, for their own convenience, it may well be that there is a continuous obligation imposed upon the company to maintain the substituted piece of road, and I can see nothing in the section to exclude the common law principle which has been held by Jelf J. to be applicable to this case. The same observation may be made with regard to s. 112. I do not think that a sufficient reason for excluding the operation of the principle in question is in the present case afforded by the mere fact that in that section an obligation is expressly imposed upon the company to maintain the gates which it is made by the section their duty to erect. Upon consideration of the various sections of the special Act upon which the defendants rely, it appears to me impossible to say that the learned judge was wrong in holding that there is nothing in any of them to prevent the defendants from being subject to the liability to which they would prima facie be subject by virtue of the principle established by the authorities on the subject to which reference has been made. It was said that the decision of Wright J. in *West Lancashire Rural Council* v. *Lancashire and Yorkshire Ry. Co.* (1) upon the provisions of the Railways Clauses Consolidation Act, 1845, ought to be treated as

(1) [1903] 2 K. B. 394.

C. A. 1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

Lord Alverstone C.J.

an authority in favour of the contention for the defendants. I think that case was properly distinguished by Jelf J. in his judgment. It was a decision upon the sections of an Act which does not apply to the railway with which we are dealing, and turned on the particular terms of those sections.

I should only wish to add for myself that, if the matter ever came before this Court in such a way that it became necessary to decide it, I should, as at present advised, feel much difficulty with regard to the distinction made between a road diverted by being carried under a railway and a road diverted by being carried over a railway in *London and North Western Ry. Co.* v. *Skerton* (1), and the Irish cases, *Waterford and Limerick Ry. Co.* v. *Kearney* (2), and *Fosberry* v. *Waterford and Limerick Ry. Co.* (3), which the Court of Queen's Bench followed in the first-mentioned case. For these reasons I think that the contention for the defendants fails and the appeal must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I adopt the judgment just delivered by my Lord, and that of the learned judge in the Court below. I will only add that, in my opinion, the law as settled by the cases of *Rex* v. *Inhabitants of Kent* (4), *Rex* v. *Inhabitants of the Parts of Lindsey* (5), *Rex* v. *Kerrison* (6), and *Reg.* v. *Inhabitants of Isle of Ely* (7) practically amounts to this: that, where persons, acting under statutory authority, for their own purposes interrupt a highway by some work which renders it impossible for the public to use it, an obligation is prima facie imposed upon them to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and that the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance. In order to rebut the presumption that such an obligation is imposed upon them, such persons must shew that the statute under the authority of which they were acting contains some provision amounting to an

(1) 5 B. & S. 559.
(2) 12 Ir. C. L. R. 224.
(3) 13 Ir. C. L. R. 494.
(4) 13 East, 220.
(5) 14 East, 317.
(6) 3 M. & S. 526.
(7) 15 Q. B. 827.

exemption from such an obligation. It is not enough, in my opinion, that the statute is silent on the point.

FARWELL L.J. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *J. N. Mason & Co., for Sworder & Longmore, Hertford.*

Solicitor for defendants: *E. Moore.*

NOTE.—The following are the sections of the special Act (6 & 7 Will. 4, c. ciii.) which were referred to in argument:—

By s. 14 it was enacted that the said company should "at their own expense make and maintain banks or slopes on both sides of the said railway along the whole line thereof in the estate of" a certain landowner mentioned in the section, "which banks or slopes" should "be at least four feet in depth," and should make and for ever thereafter "maintain good and sufficient post and rail fences as well at the top as at the bottom of all the said banks and slopes along the whole line of the said railway through the estate of the said" landowner.

Sect. 31: "For the purposes and subject to the provisions and restrictions of this Act it shall be lawful for the said company . . . . to make or construct, upon, across, under, or over the said railway or other works or any lands, streets, hills, valleys, roads, railroads or tramroads, rivers, canals, brooks, streams, or other waters, such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences, as the said company shall think proper; . . . . and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under or by the side of the said railway; . . . . and also from time to time to alter, repair, or discontinue the before-mentioned works or any of them and to substitute others in their stead and generally to do and execute all other matters and things necessary or convenient for constructing, maintaining, altering, or repairing and using the said railway and other works by this Act authorized; they the said company . . . . doing as little damage as may be in the execution of the several powers to them hereby granted, and the said company making full satisfaction in manner hereinafter mentioned to all persons and corporations interested in any lands which shall be taken, used, or injured for all damage to be by them sustained in or by the execution of all or any of the powers hereby granted."

Sect. 102: "The said railway shall not be made across any street or highway, or public bridleway or footpath, on the level, without the previous consent in writing of some two justices of the peace for the county acting for the division within which the street, highway, bridleway, or footpath so to be crossed shall be situate, and where the said railway shall cross any public bridleway or footpath in any other manner than on the level the said

C. A.

1909

HERTFORDSHIRE COUNTY COUNCIL v. GREAT EASTERN RAILWAY.

company shall make and maintain convenient ascents and descents as the case may be to such bridleway or footpath."

Sect. 104 is in almost identical terms with s. 102 and was apparently left in the Act by mistake.

Sect. 105: "Where the said railway shall cross any turnpike road either such turnpike road shall be carried over the said railway or the said railway shall be carried over the said turnpike road, at the expense of the said company, by means of a bridge of such construction as is hereinafter mentioned."

Sect. 109: "Provided always, and be it further enacted that it shall and may be lawful to and for the said company, with the consent of the trustees of any turnpike road, or the surveyors of any highway (which consent such trustees and surveyors are hereby authorized and empowered to give if they shall see fit so to do) to make any alterations in any road or bridge, such alterations being made by and at the expense of the said company."

Sect. 111: "In all cases wherein, in the exercise of any of the powers hereby granted, any part of any carriage or horse road, railway or tramroad, either public or private, shall be found necessary to be cut through, raised, and taken, or so much injured as to be impassable or inconvenient for passengers or carriages, or the persons entitled to the use thereof, the said company shall, at their own expense, before any such road shall be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road (as the case may require) to be set out and made instead thereof as convenient for passengers and carriages as the said road so to be cut through, raised, sunk, taken or injured as aforesaid, or as near thereto as may be; and where the road cut through, raised, sunk, or injured shall be a turnpike road, the substituted road, if temporary, shall be set out and made, and the principal road shall be restored within six calendar months after the commencement of the operation . . . ."

Sect. 112: "In all cases wherein the said railway shall cross any public highway on a level the said company shall erect and at all times maintain a good and sufficient gate on each side of such public highway where the said railway shall communicate therewith, all which gates shall be constantly kept shut by some person to be appointed by the said company, and which person the said company are hereby required to appoint, except during the times when carriages passing along the said railway shall have to cross such public highway, and then the same shall be opened for the purpose only of letting such carriages pass through; and such gates shall be so constructed as when opened for passage along the said railway they shall close the passage of the said public carriage road across the said railway; and the persons entrusted with the care of such gate shall cause every such gate to be shut as soon as such carriages shall have passed through the same, under the penalty of forty shillings for every default therein."

E. L.

STOWE *v.* BENSTEAD AND ANOTHER.

1909
May 13.

Game—Seizure and Detention by Police Officer of Partridges' Eggs—Justification under Statute—Subsequent Proceedings under different Statute not giving Power to seize Eggs—Conviction of Person from whom Eggs seized quashed—Liability of Police Officer in Trover—Restoration of Game or "value thereof"—Game Act, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 24—*Poaching Prevention Act*, 1862 (25 & 26 *Vict. c.* 114), *ss.* 1, 2.

In s. 2 of the Poaching Prevention Act, 1862, "the value" of the game which is to be restored to an innocent person from whom it has been taken by a police officer, in pursuance of the power of seizure given by the section, means the value of the game at the time of the termination in favour of the innocent person of proceedings subsequently taken against him by the police officer under the provisions of the section, and not the value of the game at the time it was seized.

A police officer seized certain partridges' eggs in accordance with the provisions of s. 2 of the Act of 1862 (under which partridges' eggs are "game"), but subsequently took out a summons against the person from whom he seized them charging him before justices with an offence against s. 24 of the Game Act, 1831, which contains no power of seizure. A conviction under the summons was, on a case stated by the justices, quashed. By order of the justices the eggs were destroyed:—

Held, that the police officer was liable for the value of the eggs at the time they were seized in an action founded on trover, inasmuch as it is a condition subsequent to any steps that a police officer takes under s. 2 of the Poaching Prevention Act, 1862, that he should continue to proceed under that section in order to be entitled to its protection. If he seizes game with a bona fide intention of acting under s. 2 of the Act of 1862, but subsequently proceeds under a different statute, his act of seizure is thereby rendered unlawful and he becomes in law a trespasser.

APPEAL by the plaintiff from a judgment of the judge of the Sudbury County Court.

The plaintiff's claim in the county court was in trover for damages for conversion of 564 game eggs. In the alternative the plaintiff claimed under s. 2 of the Poaching Prevention Act, 1862, the value of the eggs.

The facts were as follows. The plaintiff Stowe was a game farmer. The defendant Benstead was a police sergeant, and the other defendant was a police inspector and Benstead's superior officer. On May 22, 1908, the plaintiff employed one Bugg to

1909

STOWE v. BENSTEAD.

take 564 partridges' eggs in a hamper to Lavenham railway station in Suffolk. While taking them to Lavenham station Bugg was stopped on the highway by the defendant Benstead. He searched Bugg's cart and found in it the hamper of eggs, which he took away. On the same day the plaintiff's solicitor wrote to the defendant Benstead, requesting him to return the eggs to the plaintiff. This request was refused. On May 26 Benstead took out a summons against the plaintiff and Bugg under s. 24 of the Game Act, 1831, charging Bugg with "unlawfully and knowingly having in his possession 564 partridges' eggs which had theretofore been unlawfully and wilfully taken out of nests upon certain land, he not having the right of killing game upon the land," and the plaintiff with unlawfully procuring or commanding Bugg to commit the offence.

Sect. 24 of the Game Act, 1831, provides "that if any person not having the right of killing the game upon any land . . . . shall wilfully take out of the nest or destroy in the nest upon such land the eggs of any bird of game . . . . or shall knowingly have in his . . . . possession . . . . any such eggs so taken, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every egg so taken . . . . or so found in his . . . . possession . . . . such sum of money, not exceeding 5*s*., as to the said justices shall seem meet. . . . ."

The summons was heard on June 5, and the plaintiff was convicted and fined 2*s*. an egg, or 56*l*. 8*s*. in all, whilst Bugg was bound over to come up for judgment when called upon. A case was stated by the justices for the Divisional Court, and on October 21, 1908, the conviction was quashed. The plaintiff thereupon applied to the defendants for the value of the eggs, which they refused to pay. On November 19, 1908, the plaintiff commenced the action in the county court against the defendants. On November 20, 1908, the justices made an order for the destruction of the eggs. The order did not upon its face refer to any statute, but it was apparently made under s. 2 of the Poaching Prevention Act, 1862. Sect. 2 of the Poaching Prevention Act, 1862, provides "that it shall be lawful for any constable or peace officer . . . . in any highway . . . . to search any person whom he may have good cause to suspect of coming

from any land where he shall have been unlawfully in search or pursuit of game" (which by s. 1 includes partridges' eggs) "or any person aiding or abetting such person, and having in his possession any game unlawfully obtained . . . . and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game . . . . is being carried by any such person, and should there be found any game . . . . upon any such person, cart, or other conveyance, to seize and detain such game . . . . and such constable or peace officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace . . . . and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game . . . . or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, ... and the justices shall direct the same to be sold or destroyed . . . . and if no conviction takes place, the game or any such article or thing as aforesaid, or the value thereof, shall be restored to the person from whom it had been seized."

The county court judge gave judgment for the defendants. He assessed the value of the eggs at the time they were seized at 18*l.* 16*s.* The plaintiff appealed on the grounds (1.) that the county court judge was wrong in law in holding that the defendants did not on May 22, 1908, wrongfully seize the eggs, and (2.) that he was wrong in law in holding that the defendants did not on and after October 21, 1908, wrongfully refuse to pay to the plaintiff the value of the eggs.

Henlé, for the plaintiff. Assuming that the defendants can justify the seizure of the eggs under s. 2 of the Poaching Prevention Act, 1862, the plaintiff on October 21, 1908, when his conviction was quashed, was in the same position as if he had not been convicted. He was therefore entitled under the section to the restoration of the eggs "or the value thereof," i.e., the value at the time they were seized. The words "the value thereof" do not mean merely the value of the game at the time the person from whom it has been taken is entitled

1909

STOWE v. BENSTEAD.

to require its restoration, when it may have greatly deteriorated or have become altogether valueless.

Secondly, the defendants cannot justify the seizure under s. 2 of the Poaching Prevention Act, 1862, having regard to the subsequent proceedings which were taken against the plaintiff, and they are therefore liable at common law in trover. The judgment of Bovill C.J. in *Clarke* v. *Crowder* (1) shews that in order to be entitled to the protection of the statute it was necessary for the defendants to apply to the justices for a summons under s. 2 of the Act of 1862. Instead of doing so, a summons was taken out under s. 24 of the Game Act, 1831, which gives no right to seize the game. By taking out that summons the defendants shewed that they were not proceeding under s. 2 of the Act of 1862. The eggs, being game, were not the subject of larceny at common law. The seizure could not therefore be justified on the ground of suspicion that they had been stolen. The possession of the plaintiff by his servant Bugg was at common law good against the whole world except the true owner, and as the defendants cannot justify the seizure under s. 2 of the Act of 1862, they are liable in trover for the value of the eggs at the time of the wrongful seizure. [*Armory* v. *Delamirie* (2) was also referred to.]

Bulloch, for the defendants, was requested by the Court to confine his argument to the question whether the defendants could justify the seizure of the eggs under s. 2 of the Poaching Prevention Act, 1862. The seizure of the eggs was lawful under s. 2 of the Poaching Prevention Act, 1862, and the fact that a summons was subsequently taken out under s. 24 of the Game Act, 1831, cannot render the seizure unlawful. The opinion expressed by Bovill C.J. in *Clarke* v. *Crowder* (1), that when a constable has seized game under s. 2 of the Act of 1862 he is bound to take out a summons under the section, was not necessary for the decision in that case. The head-note in the *Law Reports* correctly states the point actually decided.

It must be admitted that as soon as a constable departs from the procedure provided by s. 2 of the Act of 1862 he becomes a wrong-doer, but up to that point he is protected. The original

(1) (1869) L. R. 4 C. P. 638. (2) (1722) 1 Str. 504.

possession of the defendant Benstead being rightful, nothing which subsequently occurred rendered it unlawful. [The Police (Property) Act, 1897 (60 & 61 Vict. c. 30), s. 1, sub-s. 1, and *Buckley* v. *Cross* (1) were also referred to.]

DARLING J. In this case it has been contended on two grounds by Mr. Henlé, on behalf of the plaintiff, that the appeal should be allowed, and I have come to the conclusion that it succeeds, not upon the first, but upon the second point taken by him. An order was made, apparently under s. 2 of the Poaching Prevention Act, 1862, for the destruction of the eggs. The justices had power to make the order, inasmuch as the language of the section is "the justices shall direct the same to be sold or destroyed, and the proceeds of such sale . . . . to be paid to the treasurer of the county or borough where the conviction takes place . . . . and if no conviction takes place"—that was in substance the case here, because the conviction was quashed—"the game . . . . or the value thereof, shall be restored to the person from whom it had been seized." On behalf of the plaintiff it was contended that, in an action of detinue and trover brought against a police officer who fails to restore the game, the value of the game which he is liable to be called upon to pay under the section is its value at the time it was taken from the custody of the innocent person from whom it was seized. In the present case the partridges' eggs, which are game within the meaning of the Poaching Prevention Act, 1862, were seized on May 22, 1908, when they were quite fresh, but the proceedings subsequently taken against the plaintiff did not terminate in his favour until the latter part of the following October, by which time they were addled and useless. I am of opinion that the meaning of s. 2 of the Poaching Prevention Act, 1862, applied to the facts of the present case, is that the value of the eggs at the time the conviction of the plaintiff was quashed is to be restored to him. If the game itself is not restored, its value at the time fixed by the section for its restoration must be paid whether it has appreciated or depreciated since the seizure. With regard to this point, therefore, I do not think we could have allowed the appeal.

(1) (1863) 32 L. J. (Q.B.) 129.

1909

STOWE v. BENSTEAD.

Darling J.

But there is a much more serious objection taken to the decision of the county court judge, and upon this point I think the plaintiff is entitled to succeed. If the police officer when he seized the eggs had been proceeding under s. 2 of the Poaching Prevention Act, 1862, I do not think that this action would have lain against him. The section gives him in certain circumstances the right to search for and seize game, and if in the present case the police sergeant had been acting under s. 2 of the Act of 1862, he would have been perfectly right in doing so, and his original seizure of the eggs would be justified, so that he could not have been sued in trover. But it appears that he did not proceed under that section. Having seized the game, instead of proceeding under s. 2 of the Act of 1862, he took out a summons under a totally different statute, namely, s. 24 of the Game Act, 1831. If the plaintiff had been lawfully convicted of the offence against that section with which he was charged he would have been liable to a penalty not exceeding 5*s.* in respect of every egg. The aggregate of the penalties to which he would be liable under that section might therefore largely exceed the fine of 5*l.* which could have been inflicted upon him under s. 2 of the Act of 1862. The Game Act, 1831, gives a police officer no power to seize the eggs. All it allows him to do is to summon the person who may be in possession of them. Probably the Poaching Prevention Act, 1862, was passed for the reason that partridges' eggs in nests are not the subject of larceny at common law. They are the eggs of wild creatures and they follow the condition of the birds producing them. Neither the Game Act, 1831, nor the Poaching Prevention Act, 1862, makes them the subject of larceny. I am of opinion that as the police sergeant, instead of proceeding under the Act of 1862, took proceedings under the Act of 1831, which gave him no power to seize the eggs, he cannot be allowed to say that he had a right to seize them because he might have seized them if he had been proceeding under the Act of 1862. The latter Act is very distinct in its terms. It gives the constable power to search for and seize the articles mentioned, and then prescribes the procedure to be adopted by him for the purpose of obtaining a conviction. He may only search for and seize game under the

Act of 1862 if he is contemplating proceedings under that Act. If he is proceeding under some other statute he has no justification for seizing. Suppose a police officer were to determine to take partridges' eggs away from a person on suspicion of his having stolen them and to prosecute him for larceny of the eggs; the charge would break down, as they are not the subject of larceny. It is obvious that the police officer could not be allowed to say, in effect, "I am protected against any action of trover because in seizing the eggs I was proceeding under the Poaching Prevention Act, 1862." I am of opinion that in the present case the seizure was made in contemplation of proceedings under the Game Act, 1831, and that the constable cannot justify it under s. 2 of the Poaching Prevention Act, 1862. In these circumstances the defendants are liable in trover. The action is therefore maintainable, and the appeal must be allowed and judgment entered for the plaintiff for 18*l.* 16*s.*, the only value found as that of the eggs at any time.

JELF J. I am of the same opinion upon both points. So long as a constable is really acting under s. 2 of the Poaching Prevention Act, 1862, he is doing his duty to the public, and if at the end of the proceedings under that section before the justices against the person from whom the game is seized for having "obtained such game by unlawfully going on any land in search or pursuit of game" the person charged with the offence is acquitted, and the police officer returns the game which has been in his custody, if he still has it, he has done no wrong, and nothing can be claimed against him by way of damages. If he detains it after that time he is liable either to return the game or to pay its value. If it is not possible to return the game in specie he is liable for its value. As a matter of common sense it is clear that the meaning of s. 2 of the Poaching Prevention Act, 1862, is that not the original value of the game, but its value at the time when it ought to be restored, whether greater or less than its value at the time of the seizure, is to be paid. With regard to that point, therefore, I think the appeal fails.

On the second point I am clearly of opinion that it ought to succeed. In the present case the police sergeant acted in the

1909

STOWE v. BENSTEAD.

Jelf J.

first instance as if he intended to obey the provisions of s. 2 of the Poaching Prevention Act, 1862, which gives him power to search for and seize these eggs. He then sought to use the advantage of being in possession of the eggs, which he obtained by starting under the Act of 1862, in the subsequent proceedings which he took under a totally different statute, namely, the Game Act, 1831. It is a condition subsequent to all that he does under the Act of 1862 that he should continue to proceed under that statute if he desires its protection. If he starts with a bona fide intention of acting under the Act of 1862, and then seeks to use, for any purpose not contemplated by that statute, the possession of the eggs which he has seized, he loses the benefit of the protection given him by the Act in respect of that which he has done and becomes, in effect, a trespasser ab initio. In the present case, as the police officer did not proceed in conformity with the provisions of s. 2 of the Act of 1862, but preferred a totally different charge against the plaintiff, I am of opinion that he lost the protection afforded to him. His act in seizing the eggs became unlawful by relation and he became in law a trespasser. For these reasons I think the plaintiff was entitled to maintain this action, and the appeal must therefore be allowed.

Appeal allowed.

Solicitor for plaintiff: *Arthur Toovey, for Bankes Ashton & Hindmarsh, Bury St. Edmunds.*

Solicitors for defendants: *Edgar, Robins & Grimsdell, for Salmon & Son, Bury St. Edmunds.*

J. E. A.

MERCANTILE STEAMSHIP COMPANY *v.* HALL.

1909
April 27;
May 25.

Ship — Agreement with Crew — Stipulations contrary to Law — Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 114.

Stipulations in an agreement between the master of a ship and the crew which are inconsistent with any of the provisions of the Merchant Shipping Act, 1894 (as for instance where the agreement provides that for absence by a seaman from his ship without leave deductions shall be made from his wages differing in amount, and enforceable in a different manner, from the deductions provided by the Act), are "contrary to law" within the meaning of s. 114 of that Act, and are therefore not permissible.

Special Case stated by consent.

1. The plaintiffs the Mercantile Steamship Company, are the owners of the British foreign-going steamship *Lena*. The plaintiff Stanley George Dale is and was at all material times the master of the said steamship.

2. The defendant, Charles Stewart Hall, was at all material times superintendent of the mercantile marine office at Barry.

3. On or about October 6, 1908, the *Lena* was at Barry loading a cargo of coals for carriage to Port Said, and after discharge of such coal from the *Lena* her owners had in contemplation for her further lawful trading and the ultimate termination of her voyage at a home port.

4. For the purpose of the said voyage a crew of twenty-seven hands all told was required for the *Lena*, and the plaintiff Dale, as master, had on or before October 6, 1908, arranged with a crew to that number of hands and of the necessary ratings to serve on board the *Lena* for the said voyage upon the terms of an agreement which contained, inter alia, the following stipulations:—"The said master shall be entitled to deduct from the wages of any member of the said crew the following amounts, viz.:—for not joining at the time specified in column 11 two days' pay, or at his option any expenses which have been properly incurred in hiring a substitute, and for absence at any time without leave from his ship or from his duty a sum equal

1909

MERCANTILE STEAMSHIP COMPANY v. HALL.

to two days' pay for any period of absence not exceeding twenty-four hours, and a further sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence."

5. After so arranging with the proposed crew, the plaintiff Dale and the said proposed crew attended on October 6, 1908, at the mercantile marine office at Barry for the purpose of signing an agreement in the terms aforesaid in the presence of the defendant; but the defendant, though in other respects raising no objection to the proposed agreement, refused to allow the same or any agreement containing the stipulation hereinbefore set out to be signed in his presence, and refused to attest the said agreement or any agreement containing the said stipulation, stating as his reason for so refusing that he was instructed by the Board of Trade so to do on the ground that the stipulation was contrary to law.

6. By reason of the defendant's refusal the plaintiffs were unable to engage the proposed or any crew on the terms of the said agreement and have been compelled to omit the said stipulation from the agreement entered into with the crew for the said voyage and from all agreements with crews serving on board the *Lena*.

7. The plaintiffs contend that the said proposed agreement and the said stipulation were not and are not contrary to law, that the said refusal of the defendant was wrongful, and that by reason of such refusal they have suffered damage.

8. The defendant, while not admitting that in point of law any action would lie against him in respect of the acts and conduct above set forth, does not in the present case insist upon any such objection, but contends only that in any view his refusal to allow the said proposed agreement to be signed in his presence and the refusal to attest the same were justified on the ground that the said stipulation was contrary to law, and that the Board of Trade had on that ground instructed him to refuse to allow any agreement containing it to be signed in his presence and to refuse to attest any such agreement.

9. The question for the opinion of the Court is whether the said stipulation was contrary to law.

Atkin, K.C., and *Adair Roche*, for the plaintiffs. The Merchant Shipping Act, 1894, provides by s. 113 that the master of every ship shall enter into an agreement in accordance with the Act with every seaman in his crew. Sect. 114 requires by sub-s. 2 that the agreement shall contain certain particulars as to the nature and duration of the voyage, the number and description of the crew, the amount of the seaman's wages, the scale of provisions, regulations as to conduct, &c. And by sub-s. 3 "The agreement with the crew shall be so framed as to admit of such stipulations to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law." The stipulation objected to in the present case as to the deduction by the master from the wages of a seaman who is absent without leave is not contrary to law. It is not open to objection under the general law apart from the Merchant Shipping Act, and there is nothing in that Act which either expressly or by necessary implication prohibits it. It is true that s. 221 (1) provides by sub-s. (*b*) that a seaman who is absent without leave shall be liable to be

(1) Merchant Shipping Act, 1894, s. 221: "If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences he shall be liable to be punished summarily as follows:—

. . . . . .

"(*b*) If he . . . . is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour."

Sect. 226: "Nothing . . . . in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage."

1909

MERCANTILE STEAMSHIP COMPANY v. HALL.

punished summarily, and to forfeit at the discretion of the Court before whom he is prosecuted a sum not exceeding two days' pay, whereas under the agreement the amount of the forfeiture is fixed at two days' pay absolutely and may be deducted from his wages by the master without the intervention of a Court. The section also differs from the agreement in respect of the amount which the seaman is to forfeit for continued absence. But that section was not intended to provide the master's only remedy. This is clear from s. 226, which expressly says that nothing in the sections relating to absence without leave shall take away any remedy by action which the master would have for any breach of contract in respect of that offence. That being so, it is open to the parties to agree upon the liquidated damages for the breach of contract arising from the seaman's absence from his ship, and in an action to recover the agreed damages the Court would have no discretion over the amount to be recovered. But if the Court would have no discretion over the amount it is no extension of the remedy by action, which is preserved by the section, to allow the master, instead of bringing the action, to deduct the amount from the wages himself.

Sir W. S. Robson, *A.-G.*, and *Rowlatt*, for the defendant. The stipulation is contrary to law in that it fixes the amount of the forfeiture and makes the master the tribunal which is to decide whether the forfeiture is to be enforced instead of the Court of summary jurisdiction. The expression "contrary to law" includes any agreement which is inconsistent with the provisions of the Act. The deductions which the agreement provides are not in the nature of liquidated damages; they have no relation to the damage which the master would suffer. They are nothing else than punishment for an offence; and the parties cannot be allowed to alter by agreement the punishments created by the Act. Sect. 226 has no application to the present case. What that section preserves is a remedy by action for a breach of contract. But what is claimed here is a right to make a deduction from the wages without establishing it by an action.

Atkin, *K.C.*, in reply.

1909

MERCANTILE STEAMSHIP COMPANY v. HALL.

May 25. PICKFORD J. This is a special case stated in an action brought by the plaintiffs against the superintendent of the mercantile marine office at Barry in consequence of his refusal to allow certain stipulations to be inserted in the agreement between the plaintiffs and the crew of one of their ships. The defendant's reason for his refusal was that he was instructed by the Board of Trade to disallow such stipulations as being contrary to law. The stipulations in question were as follows: "The said master shall be entitled to deduct from the wages of any member of the said crew the following amounts, viz.:— for not joining at the time specified in column 11 two days' pay or at his option any expenses which have been properly incurred in hiring a substitute, and for absence at any time without leave from his ship or from his duty a sum equal to two days' pay for any period of absence not exceeding twenty-four hours, and a further sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence." The terms of the engagement of seamen are dealt with by a group of sections of the Merchant Shipping Act, beginning with s. 113. That section provides that the master of every ship shall enter into an agreement with the crew in accordance with the Act. Sect. 114 by sub-s. 2 provides for terms which the agreement shall contain, and by sub-s. 3 "The agreement with the crew shall be so framed as to admit of such stipulations to be adopted at the will of the master and seaman in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law"; and the question in the present case is whether the stipulations objected to by the Board of Trade are contrary to law. I reserved my judgment because I wished to see if I could get from any of the authorities any guidance as to what was the exact meaning that had been attached by the Courts to the wide words "contrary to law." I have not got any great assistance from the cases, because I do not think any of them turned on facts and considerations such as those which arise in this case. Of course a stipulation may be contrary to law in a great many ways. It may be contrary to the general law, but it is not suggested that the stipulation is so here. Or it may be contrary

1909

MERCANTILE STEAMSHIP COMPANY v. HALL.

Pickford J.

to certain express provisions of the Merchant Shipping Act. There are no express provisions in that Act prohibiting stipulations of this description; therefore I have to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law within the meaning of s. 114 if they are inconsistent with the provisions of the Act. I am of opinion that they are, and the question therefore narrows itself to this: Are these stipulations inconsistent with the provisions of the Act dealing with the same subject? The provisions of the Act with which they are said to be inconsistent are contained in s. 221, sub-s. (*b*). That sub-section deals with the same subject of absence without leave and provides a punishment in these terms: "If a seaman lawfully engaged . . . . commits any of the following offences he shall be liable to be punished summarily as follows:— . . . . (*b*) If he neglects or refuses without reasonable cause to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion," which is provided for in the previous sub-section, "or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour." The sub-section provides certain consequences which shall follow upon the offence of absence without leave. The stipulations proposed to be introduced into the agreement also provide certain consequences which shall follow upon the offence of absence without leave, and they are different consequences from those mentioned in the Act. The Act provides that for absence without leave the seaman shall forfeit a sum "not exceeding" two days' pay, and in addition "for every twenty-four hours of absence either a sum not exceeding six days' pay or any

expenses properly incurred in hiring a substitute," whereas the agreement provides that he shall forfeit "a sum equal to two days' pay," thereby fixing the amount absolutely, "and a further sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence," thereby substituting four days' pay for six, an uncompleted period of twenty-four hours for a completed period, and striking out the alternative of the expenses of hiring a substitute. Now those consequences so provided by the agreement must either be in addition to or in substitution for those provided by the Act. If they are in substitution they must amount to a repeal of the provisions of the Act, and that is a thing which is beyond the competency of the parties. If they are in addition they provide that the seaman is to be punished in accordance with the provisions of the Act, but also is to receive further punishment, and therefore I think they are inconsistent with the provisions of the Act.

But Mr. Atkin contends that the stipulations are justified by s. 226. That section enacts that "Nothing . . . . in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage." It is contended that the stipulations merely amount to a fixing of the damages that can be recovered for the breach of contract in being absent without leave, and that they are therefore within the saving of s. 226. If that were the effect of the stipulations there might possibly be something in the argument. But they go a great deal further; they do not leave the master to recover by action the amount so fixed, but provide that the amount is to be deducted by the master from the wages of the seaman; and I do not think it is competent for the parties to make an agreement by which a deduction is to be made from the seaman's wages for absence without leave different, and enforceable in a different way, from the deduction which is provided by the Merchant Shipping Act. I think, therefore, that

1909

MERCANTILE STEAMSHIP COMPANY v. HALL.

these stipulations are inconsistent with the provisions of s. 221, and, being so, are "contrary to law" within the meaning of s. 114. There must be judgment for the defendant.

Judgment for the defendant.

Solicitor for defendant: *Solicitor to the Board of Trade.*
Solicitors for plaintiffs: *Botterell & Roche.*

J. F. C.

1909
May 22.

In re HALLMAN.
Ex parte ELLIS & COLLIER.

Bankruptcy—Practice—Costs in Divorce Court—Order to pay—Default—Judgment Summons—Receiving Order in lieu of Committal—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5.

The debtor, as the co-respondent to a husband's petition in the Divorce Court, was ordered to pay the petitioner's costs of the suit, which were subsequently taxed at £110 7*s.* 10*d.* The debtor was then ordered to pay the £110 7*s.* 10*d.* by a specified date to the petitioner's solicitors, but did not comply with the order, whereupon the solicitors issued against him a debtor's summons under the Debtors Act, 1869, at the hearing of which there was evidence that he had means to pay:—

Held, that there was jurisdiction under s. 103 of the Bankruptcy Act, 1883, to make a receiving order against the debtor.

THIS was an application on a judgment summons for a receiving order against the debtor in lieu of a committal in these circumstances.

The debtor, a married man, was the co-respondent in the suit of *Hucker* v. *Hucker and Hallman* in the Divorce Court, which was the husband's petition for a divorce on the ground of his wife's alleged adultery with the co-respondent. At the trial in December, 1908, the jury found that the wife had committed adultery with the co-respondent and assessed the damages at 200*l.*, and the judge pronounced a decree nisi and ordered the co-respondent to pay the damages and the petitioner's costs of the suit. These costs were afterwards taxed at 110*l.* 7*s.* 10*d.*,

1909

HALLMAN, *In re.*
ELLIS & COLLIER, *Ex parte.*

and on March 25, 1909, the President of the Divorce Court made an order that the debtor should within seven days from the service of the order pay to Messrs. Ellis & Collier, the solicitors of the petitioner, the sum of 110*l.* 7*s.* 10*d.*, being the amount of the petitioner's taxed costs, the said Messrs. Ellis & Collier undertaking to pay any sum received under the order into Court forthwith. This order was duly served personally on the debtor on April 16, but he did not comply with it. Thereupon Messrs. Ellis & Collier issued a judgment summons against him under the Debtors Act, 1869, which, after reciting the order of March 25 and his default in non-payment of the 110*l.* 7*s.* 10*d.*, required him to shew cause why he should not be committed to prison for his default in not paying the 110*l.* 7*s.* 10*d.*, or why a receiving order should not be made against him pursuant to sub-s. 5 of s. 103 of the Bankruptcy Act, 1883. The summons now came on for hearing, and there was evidence that the debtor had means to pay.

Tindale Davis, for the summons. The order of the Divorce Court for payment of the costs constituted "a debt" within s. 5 of the Debtors Act, 1869, capable of being enforced by committal: *Hewitson* v. *Sherwin.* (1) On the first hearing of a judgment summons it is usual to make an order for payment by instalments in lieu of a committal, but the applicants ask for the alternative relief of a receiving order against the debtor under s. 103 of the Bankruptcy Act, 1883, and base their application on *In re Clark* (2) and *In re a Debtor.* (3)

[PHILLIMORE J. Is not *In re Binsted* (4) against you?]

It is not. That case decided that an order to pay costs could not be used as a "judgment" for the purposes of a bankruptcy notice under s. 4 of the Bankruptcy Act, 1883; and in *In re Muirhead* (5) it was also decided that an order to pay damages in the Divorce Court could not be made the basis of a bankruptcy petition under s. 6 of the Bankruptcy Act, 1869. But the applicants are not invoking the jurisdiction of the Court

(1) (1870) L. R. 10 Eq. 53.
(2) [1898] 1 Q. B. 20.
(3) [1905] 1 K. B. 374.
(4) [1893] 1 Q. B. 199.
(5) (1876) 2 Ch. D. 22.

1909

HALLMAN, *In re.* ELLIS & COLLIER, *Ex parte.*

under either of those sections. Sect. 5 of the Debtors Act provides that the Court may commit to prison any person who makes default in payment of "a debt" due from him in pursuance of "any order or judgment" of any Court of competent jurisdiction, and in *In re Clark* (1) A. L. Smith L.J. says: "Upon the true construction of s. 103, sub-s. 5, of the Bankruptcy Act, 1883, wherever a judge has jurisdiction to commit a judgment debtor for not paying the debt under the Debtors Act, 1869, the section in my judgment gives him jurisdiction in mercy to the debtor to make a receiving order against him in lieu of committing him to prison." The applicants rely on that statement of the law and on the words "any order" in s. 5 of the Debtors Act, 1869.

The Debtor in person. The application is premature because the order nisi may be rescinded. The summons should stand over until after a decree absolute has been made.

PHILLIMORE J. I will make a receiving order against the debtor. The creditors must undertake to pay the prescribed fee.

Solicitors for creditors: *Ellis & Collier.*

(1) [1898] 1 Q. B. 20, at p. 21.

H. L. F.

LOWERY *v.* WALKER.

1909
May 24.

Savage Animal—Scienter—Liability of Owner to Trespassers.

The defendant put into his field a horse which to his knowledge would bite human beings. Members of the public had for many years to the defendant's knowledge habitually trespassed on the field. The plaintiff while so trespassing was bitten by the horse:—

Held, that the fact of the defendant's knowledge that the public habitually trespassed there imposed no duty upon him to take any care for their protection, and that he was not liable to the plaintiff for the injuries sustained.

APPEAL from the Whitehaven County Court.

The defendant, a farmer, kept in one of his fields a horse which to his knowledge was savage and had previously bitten human beings. There was no footpath through the field, but members of the public had, as the defendant knew, for at least thirty-five years habitually trespassed across it as a short cut from a highway to a railway station. The plaintiff while trespassing upon the field was bitten by the horse. The defendant had frequently interfered with people who were crossing the field, but had never taken any legal proceedings for the purpose of stopping the trespasses. He gave as his reason for not taking such proceedings that most of the trespassers were customers for his milk. The county court judge held that the defendant in putting a horse which he knew to be dangerous into a field which he knew was habitually used by the public was guilty of negligence, and he accordingly gave judgment for the plaintiff. The defendant appealed.

Leslie Scott, for the defendant. The plaintiff being, as the county court judge found, a trespasser, the defendant was under no duty towards him to take care that the field was safe. The fact that the public habitually trespassed there could make no difference in that respect. In *Harrison* v. *North Eastern Ry. Co.* (1) the defendants, while running a train over a railway belonging to a dock company and situate between the dock and

(1) (1874) 29 L. T. 844.

1909

LOWERY v. WALKER.

a public promenade, knocked the plaintiff down as he was crossing the railway and injured him. The railway was not fenced, and all persons having occasion to pass between the dock and the promenade were accustomed to cross the railway line at any point and at all hours. There was a regular crossing, which the public had a right to use, but it was not there that the plaintiff was crossing at the time of the accident. It was held that with regard to persons who like the plaintiff were not crossing in a definite track there was no duty to take care. Bramwell B. seems to have treated persons crossing the line elsewhere than at the regular crossing as trespassers and to have held that the defendants' knowledge that such a trespass was of common occurrence imposed no duty upon them. "I think it monstrous," he said, "that where the company allow a trespass to be committed they should in so allowing have a special duty cast upon them." In *Ponting* v. *Noakes* (1) the defendant had a yew tree growing near the boundary between his field and the plaintiff's. The plaintiff's horse stretched his head over the boundary, thereby committing a trespass, and ate of the branches of the yew, whereby he died. It was held that the defendant was under no duty to prevent the horse from having access to the branches of the tree.

Holman Gregory, for the plaintiff. The mere fact that the plaintiff was a trespasser does not shew that there was no duty towards him. In *Barnes* v. *Ward* (2), where the defendant was held liable for leaving unfenced an area adjoining a highway whereby a person passing along the way fell in and was killed, Maule J. in delivering the judgment of the Court said: "With regard to the objection that the deceased was a trespasser on the defendant's land at the time the injury was sustained, it by no means follows from this circumstance that the action cannot be maintained. A trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained." Of this principle *Bird* v. *Holbrook* (3) and *Lynch* v. *Nurdin* (4) are illustrations. The defendant's knowledge that the public had been in the habit of trespassing in the field

(1) [1894] 2 Q. B. 281.
(2) (1850) 9 C. B. 392.
(3) (1828) 4 Bing. 628.
(4) (1841) 1 Q. B. 29.

imposed a duty upon him not to keep a dangerous animal there. In *Brock* v. *Copeland* (1) Lord Kenyon referred to a case where an action was brought against a man for keeping a savage bull that had hurt the plaintiff while crossing a field of the defendant in which the bull was kept. There was a dispute as to whether there was a right of way over the field, but the defendant had permitted several persons to go over it as a public way, and it was ruled that as the defendant, although disputing the legality of the way, had permitted persons to use it, he could not be allowed to set up in his defence the right of keeping such an animal in his field. That case is really on all fours with the present. For as the onus lay on the plaintiff to prove the right of way, no distinction could be drawn between a person using a disputed and unproven way and an admitted trespasser.

DARLING J. In this case I am of opinion that the county court judge was wrong. From his finding of the facts it appears that the plaintiff went into a field of the defendant, where he was attacked and severely bitten by a horse which to the defendant's knowledge had previously bitten other persons. The plaintiff had no right to go into the field; he was, as the judge found, a trespasser. But notwithstanding that fact the judge held that the defendant was liable, in that he had been guilty of negligence in putting a horse which he knew to be dangerous into a field which to his knowledge was habitually used by the public. That ruling is one which I do not think can be sustained. No case has been cited which establishes that a trespasser can maintain an action for injuries inflicted by a savage animal while he was trespassing, unless indeed the animal was kept for the purpose of inflicting the injury, in which event the case would no doubt fall within the principle of *Bird* v. *Holbrook*. (2) But although even as towards trespassers there is a duty not to intentionally injure, there is no duty to take care. In *Ponting* v. *Noakes* (3), where the Court were dealing with the case of injury sustained by a trespassing animal, Charles J. said: "The true test in such a case is pointed out by Gibbs C.J. in *Deane* v. *Clayton* (4) in a

(1) (1794) 1 Esp. 203.
(2) 4 Bing. 628.
(3) [1894] 2 Q. B. 281.
(4) (1817) 7 Taunt. 489.

1909

LOWERY v. WALKER.

Darling J.

judgment which was emphatically approved by the Court of Exchequer in *Jordin* v. *Crump* (1), though on the facts proved in *Deane* v. *Clayton* (2) the Court were equally divided as to what judgment should be entered. 'We must ask,' he says, 'in each case whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt.' If he had not, then (unless the element of intention to injure, as in *Bird* v. *Holbrook* (3), or of nuisance, as in *Barnes* v. *Ward* (4), is present) no action is maintainable." That seems decisive of the present case. The appeal must be allowed.

PICKFORD J. I agree. When once it is admitted that the plaintiff was a trespasser the case comes within what was said by Blackburn J. in *Fletcher* v. *Rylands* (5) as to the defendant being allowed to excuse himself for damage caused by something which he keeps at his peril by shewing that the damage was owing to the plaintiff's default. The plaintiff here by wrongfully going into the field brought the injury upon himself. It was, however, contended on his behalf that the fact of his being a trespasser was immaterial under the circumstances of the case, because the defendant knew that the public were in the habit of trespassing in the field. But that is the very contention that was disallowed in *Murley* v. *Grove*. (6) That was an action for negligence in leaving unlighted a dangerous excavation which the defendant had made in a certain street, whereby the plaintiffs' van had been driven into it in the dark. The defence was that the street was a new and unfinished road not yet dedicated to the public and that the plaintiffs were trespassers. The plaintiffs replied "that if the public, including the plaintiffs, who on or about the said 17th November used, and who for a long time previously had used and been in the habit of using the said road, were trespassers, then the defendant is notwithstanding liable to the plaintiffs . . . . for that the defendant well knowing that the said road was so used by the public and that no notice had been

(1) (1841) 8 M. & W. 782.
(2) 7 Taunt. 489.
(3) 4 Bing. 628.
(4) 9 C. B. 392.
(5) (1866) L. R. 1 Ex. 265, at p. 279.
(6) (1882) 46 J. P. 360.

or was given to the public not to use the said road, and well knowing that prior to the said excavation made by the defendant the said road was in a fit and safe condition to be and was in fact constantly and safely used by the public, yet without notice and without taking reasonable precautions to protect the public altered the condition of the said road . . . . well knowing that the said road was thereby rendered unsafe and dangerous to the public in the habit as aforesaid of using the said road." That reply was held bad on demurrer as disclosing no duty upon the defendant. That case seems to be a direct authority against the present plaintiff's contention. (1)

Appeal allowed.

Solicitors for defendant: *Harrison & Powell, for Brown, Auld & Brown, Whitehaven.*

Solicitors for plaintiff: *Blyth, Dutton, Hartley & Blyth.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

1909

April 26.

SMITH *v.* WHITEMAN AND ANOTHER.

Bill of Sale—Validity—Form in Schedule, Deviation from—Condition for Defeasance of Security—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.

At the time of the giving of a bill of sale as security for an advance, and before the completion of the transaction, the grantee handed to the grantor a card on which were printed certain conditions, which a jury found were made part of the bargain before the money was lent. One of the conditions was to the effect that borrowers were strictly prohibited from obtaining or endeavouring to obtain money from any other loan office until the account was paid; otherwise they would be liable for the full amount to be called in, as though an instalment had been missed. This condition was not inserted in the bill of sale, which otherwise was in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—

Held that, as the condition was not inserted in the bill of sale, and

(1) See and consider *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C. 229.

C. A.
1909
SMITH
v.
WHITEMAN.

would have avoided it if it had been inserted, the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; that it was therefore absolutely void under s. 9 of that Act, and the grantor's covenant for payment of interest was consequently not enforceable by the grantee.

APPLICATION of the defendants for judgment or a new trial in an action tried before Grantham J. and a special jury.

The action was brought against the defendants, a firm of money-lenders, to recover damages for trespass in seizing and putting a man in possession of certain goods comprised in a bill of sale granted by the plaintiff to the defendants. There had been three separate transactions and three separate bills of sale between the plaintiff and the defendants. The last bill of sale was expressed to be to secure a sum of 32*l.* 10*s.*, and was carried out at the plaintiff's residence by the defendants' clerk. It was in the statutory form and stated that the mortgagor, in consideration of 24*l.* 12*s.* due and owing by the mortgagor to the mortgagee and 7*l.* 18*s.* then paid by the mortgagee to the mortgagor, assigned to the mortgagee the chattels and things described in the schedule by way of security for the payment of 32*l.* 10*s.* and interest at 60 per cent.; repayment to be made by instalments of 25*s.* and interest over twenty-six months. There was the usual proviso that the chattels comprised in the bill of sale should not be liable to seizure for causes other than those mentioned in s. 7 of the Bills of Sale Act, 1882. There was given to the plaintiff a pink book or card, containing spaces for entering the dates and amounts of the repayments; on the outside were printed certain rules or conditions, the fourth of which was in the following terms:—"4. Borrowers are strictly prohibited from obtaining or endeavouring to obtain money from any other loan office or being surety for any person at any other office until this account is paid, otherwise they hold themselves liable for the full amount to be called in, the same as if an instalment was missed." Contradictory evidence was given as to the time when the plaintiff received this card, the plaintiff stating that it was handed to her by the defendants' clerk in her own house before the transaction of loan was completed, while the defendants' evidence was that it was sent

by post to the plaintiff some little time after the money had been handed over and the bill of sale executed. The jury found that the condition was made part of the bargain before the money was lent under the bill of sale, and that the repayment card formed part of the transaction. The jury also found that the defendants charged interest at 60 per cent. on the principal unpaid on the dates when the instalments of principal were to be paid. In the result the jury found a verdict for the plaintiff with 150*l.* damages, and the learned judge, holding that the bill of sale was void under s. 9 of the Bills of Sale Act, 1882, as being subject to a defeasance or condition not contained in the bill or written on the same sheet of paper, gave judgment for the plaintiff for that amount. The defendants counterclaimed for interest on the unpaid balance of the bill of sale, and they recovered a sum of 3*l.* 7*s.*, which represented interest at 5 per cent. The defendants, however, now claimed interest at the rate of 60 per cent., though it was urged on behalf of the plaintiff that that point was not taken at the trial, where the counter-claim was practically not gone into. The defendants appealed to the Court of Appeal on the grounds (inter alia) that the effect of omitting to write the condition upon the same paper as the bill of sale was at the most to avoid the registration, and not to avoid the bill of sale altogether, and that therefore the defendants were entitled to recover in their counter-claim upon the covenant for payment of interest, and that the damages were excessive.

Powell, K.C., and *Storry Deans*, for the defendants. The defendants are entitled to judgment. First, there was no evidence on which the jury could properly find that the repayment card or book was handed to the plaintiff before the transaction was completed. If it was so handed, no doubt condition 4 ought to have been written on the same paper as the bill in order to satisfy s. 10, sub-s. 3, of the Bills of Sale Act, 1878. (1) If

(1) By 41 & 42 Vict. c. 31 (the Bills of Sale Act, 1878), s. 10, sub-s. 3, "If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment

C. A. 1909

SMITH v. WHITEMAN.

the card was sent after the completion of the transaction, it would not affect the position of the parties: *Linfoot* v. *Pockett*.(1) On the evidence the proper inference was that the card was sent afterwards, and that the condition was not part of the bargain between the parties.

Upon the counter-claim, the 3*l*. 7*s*. given to the defendants for interest is not enough; that is only at the rate of 5 per cent. from the original advance, and the defendants are entitled under the covenant for payment of interest contained in the bill of sale to 60 per cent. The effect of the existence of a defeasance or condition which is not written on the same paper as the bill of sale itself is, under s. 10, sub-s. 3, of the Act of 1878, not to avoid the bill of sale in toto, but to avoid its registration only; and under s. 8 of the Act of 1882, where the registration is avoided, although the chattels comprised in the bill of sale cannot be touched, the bill of sale stands good in other respects, and the covenant for payment of interest remains enforceable. The language of Lindley L.J. in *Edwards* v. *Marcus* (2) is a strong authority in favour of the contention of the defendants. The effect of the finding of the jury is not to make the bill of sale void as a contract, but to avoid its registration only. In *Pettit* v. *Lodge & Harper* (3) the remarks of Cozens-Hardy M.R. and Fletcher Moulton L.J. as to the avoidance of the bill of sale were made per incuriam, and Buckley L.J. was careful to say in his judgment that the registration was avoided. In any event the damages were excessive.

Ritter and *Edmondson*, for the plaintiff, were not called on.

---

therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

By 45 & 46 Vict. c. 43 (the Bills of Sale Act (1878) Amendment Act, 1882), s. 8, "Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, ... and shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

By s. 9, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

(1) [1895] 2 Ch. 835.

(2) [1894] 1 Q. B. 587, at p. 591.

(3) [1908] 1 K. B. 744.

LORD ALVERSTONE C.J. [After discussing the question whether the findings of the jury were against the weight of the evidence, his Lordship proceeded:—] One point that has been raised on behalf of the defendants has given me some little trouble, arising out of the contention that, even if the defendants are wrong upon the claim, they are entitled to recover upon the counter-claim a larger sum than the amount allowed them. It is not merely the difference between 3*l.* 7*s.* and 5*l.*; it is an endeavour to enforce the bargain for payment of interest at 60 per cent. on the amount of the loan, and it is contended that nothing has occurred to affect in any way the validity of the covenant for payment of interest. I should be slow under any circumstances to allow the defendants to succeed on this ground, because I think the point was never seriously pressed upon the learned judge as a distinct point. In my judgment, however, the case is a plain one, and the bill of sale was absolutely void.

It was held in *Davies* v. *Rees* (1) that if a bill of sale is void under s. 9 of the Act of 1882, as not being in accordance with the form in the schedule, it is void in toto, and not merely as regards the personal chattels comprised in it, so that the covenant for payment of principal and interest is void also. If this particular covenant is void, the defendant cannot recover the 60 per cent. interest. The schedule to the Act of 1882 allows certain terms to be inserted in the bill of sale besides those in the form: it is difficult to say what may be the limit of such insertion, but such a condition as that in the present case is certainly not within that limit. Such a condition was obviously not allowed by the Act of 1878, and therefore the bill of sale would have been void if the condition had been written into it; and the bill of sale not being a good one under the Act of 1882, the right of the defendants to recover on the counter-claim is gone.

The same result was expressed in distinct terms by the Court of Appeal in *Pettit* v. *Lodge & Harper*. (2) It is said that those remarks were not necessary to the decision of that case and were obiter dicta only: I do not think so, although it is true

(1) (1886) 17 Q. B. D. 408. (2) [1908] 1 K. B. 744.

C. A. 1909

SMITH v. WHITEMAN.

Lord Alverstone C.J.

that the Act of 1882 was not referred to in the judgments. But when we find the lender of the money insisting on a condition which cannot be inserted in terms in the bill of sale, then the bill of sale becomes one which is not in accordance with the form in the schedule. If the lender wishes to insist upon the observance of terms or conditions by the borrower, they must not be such terms or conditions as, if inserted in the bill of sale itself, would prevent that document from being in accordance with the form in the schedule. It has been found that the true bargain between the parties is not expressed in this bill of sale, and, that being so, the appeal on the counter-claim fails.

FLETCHER MOULTON L.J. [After discussing the findings of the jury, his Lordship continued :—] Then, as to the effect of the condition not being inserted in the bill of sale. In s. 10, sub-s. 3, of the Act of 1878 it was provided that a defeasance, condition, or declaration of trust not contained in the body of a bill of sale was to be deemed to be part of the bill and must be written on the same paper as the bill before registration. So far as that Act went, the Legislature was satisfied with inflicting the penalty that if this were not done the registration of the bill should be void and the bill should be invalid as a security. But in 1882 the Legislature went further, and in s. 9 of the Act of that year they enacted that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed." What does the expression "bill of sale" as used in that section mean? It means the bill of sale and every part thereof. Since by the Act of 1878 conditions and defeasances are deemed to be part of the bill, although not in fact inserted in it, and since, if the bill is not in accordance with the form in the schedule to the Act of 1882, it is void, it follows as a necessary consequence that, as this condition is not inserted in the bill of sale, and would avoid it if it were inserted, the bill is not in accordance with the form in the schedule to the Act of 1882, and therefore the bill of sale itself is void. Taking the two Acts together, this is a void bill of sale, because, if and when the defeasance is written into it, so as to be physically (as it is

legally) a part of the bill, the total bill of sale would not be in accordance with the statutory form.

FARWELL L.J. I am of the same opinion, and will only add a few words. The decision in *Linfoot* v. *Pockett* (1) depended on the particular facts of that case: there had been no mention of a defeasance up to the time of the execution of the bill of sale; the bargain was then complete. Here the jury found that the four conditions mentioned on the repayments book were part of the original bargain between the parties. We have, then, the fact that the bill of sale contains, or must be deemed to contain, a defeasance which is in the teeth of s. 9 of the Act of 1882, which provides that the bill must be in accordance with the form in the schedule, while the form contains a proviso that there shall be no seizure of the goods comprised in the bill of sale, except for certain specified causes. It is admitted that, if the fourth condition had been inserted in terms in this bill of sale, it would be hopeless to contend that the bill was not void. But the statute says that such a condition is to be deemed to be part of the bill, and s. 9 of the Act of 1882, which was an entirely new enactment, provided that a bill of sale containing such a condition should be void. I think, therefore, that this appeal should be dismissed. (2)

Appeal dismissed.

Solicitors for plaintiff: *H. Dade & Co.*

Solicitors for defendants: *Thwaites & Thompson.*

(1) [1895] 2 Ch. 835

(2) See, however, *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547, which was not cited in the argument. The remarks (at p. 553) in the considered judgment of the Court of Appeal, although not strictly necessary to the decision, indicate the view that in such a case as the present the registration of the bill of sale would be avoided under s. 10, sub-s. 3, of the Act of 1878, but that the bill of sale itself would not be void under s. 9 of the Act of 1882.

W. J. B.

C. A
1909
April 27, 28
May 24.

[IN THE COURT OF APPEAL.]

JONES *v.* E. HULTON & CO.

Defamation—Libel in Newspaper—Publication—Intention to defame Plaintiff.

The defendants, who were the proprietors and publishers of a newspaper, published in an article in their paper defamatory statements of a named person believed by the writer of the article and by the defendants to be a fictitious personage with an unusual name not likely to be that of an existing individual; the name was in fact that of the plaintiff, who was unknown to the writer of the article and to the editor of the newspaper. During the trial of an action for libel it was admitted that neither the writer nor the defendants intended the defamatory statements to apply to the plaintiff, but evidence was given by friends of the plaintiff who had read the article that they thought the article referred to him. On appeal by the defendants from a verdict and judgment in favour of the plaintiff:—

Held by Lord Alverstone C.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that the plaintiff was entitled to succeed.

Per Lord Alverstone C.J.: Where an untrue and defamatory statement in writing is published without lawful excuse, which in the opinion of the jury upon the evidence refers to the plaintiff, the cause of action is made out, the question not being whether the defendant intended the defamatory language to refer to the plaintiff, but whether it was understood by reasonable people who knew the plaintiff to refer to him.

Per Fletcher Moulton L.J.: In order to prove the allegation in an action of libel that the defamatory words were written and published "of and concerning the plaintiff" it must be shewn affirmatively that the defendant intended them to refer to the plaintiff.

Per Farwell L.J.: It is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances believe it to be written of him: he must also prove that the defendant printed and published it of him. This can be done not only by shewing that such was the defendant's actual intention, but also by shewing that the statement is made recklessly, careless whether it fits the plaintiff or not. The question is not what the defendant really intended in his heart, but what his words taken with the relevant surrounding circumstances and fairly construed mean. The fact that the plaintiff was unknown to the defendant is not of itself a conclusive defence.

Application by the defendants for judgment or a new trial in an action tried by Channell J. with a special jury.

The plaintiff, Mr. Thomas Artemus Jones, a barrister practising on the North Wales Circuit, brought the action to recover

damages for the publication of an alleged libel concerning him contained in an article in the *Sunday Chronicle*, a newspaper of which the defendants were the printers, proprietors, and publishers. The article, which was written by the Paris correspondent of the paper, purported to describe a motor festival at Dieppe, and the parts chiefly complained of ran thus: "Upon the terrace marches the world, attracted by the motor races—a world immensely pleased with itself, and minded to draw a wealth of inspiration—and, incidentally, of golden cocktails—from any scheme to speed the passing hour. . . . . 'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham? No one, indeed, would assume that Jones in the atmosphere of London would take on so austere a job as the duties of a churchwarden. Here, in the atmosphere of Dieppe, on the French side of the Channel, he is the life and soul of a gay little band that haunts the Casino and turns night into day, besides betraying a most unholy delight in the society of female butterflies." The plaintiff had in fact received the baptismal name of Thomas only, but in his boyhood he had taken, or had been given, the additional name of Artemus, and from that time he had always used, and had been universally known by, the name of Thomas Artemus Jones or Artemus Jones. He had, up to the year 1901, contributed signed articles to the defendants' newspaper. The plaintiff was not a churchwarden, nor did he reside at Peckham. Upon complaint being made by the plaintiff of the publication of the defamatory statements in the article, the defendants published the following in the next issue of their paper: "It seems hardly necessary for us to state that the imaginary Mr. Artemus Jones referred to in our article was not Mr. Thomas Artemus Jones, barrister, but, as he has complained to us, we gladly publish this paragraph in order to remove any possible misunderstanding and to satisfy Mr. Thomas Artemus Jones we had no intention whatsoever of referring to him." The defendants alleged that the name chosen

C. A. 1909

JONES v. E. HULTON & Co.

for the purpose of the article was a fictitious one, having no reference to the plaintiff, and chosen as unlikely to be the name of a real person, and they denied that any officer or member of their staff who wrote or printed or published or said before publication the words complained of knew the plaintiff or his name or his profession, or his association with the journal or with the defendants, or that there was any existing person bearing the name of or known as Artemus Jones. They admitted publication, but denied that the words were published of or concerning the plaintiff. On the part of the plaintiff the evidence of the writer of the article and of the editor of the paper that they knew nothing of the plaintiff, and that the article was not intended by them to refer to him, was accepted as true. At the trial witnesses were called for the plaintiff, who said that they had read the article and thought that it referred to the plaintiff. The jury returned a verdict for the plaintiff with 1750*l.* damages, and the learned judge gave judgment for the plaintiff. The defendants appealed.

Rufus Isaacs, K.C., and *Norman Craig*, for the defendants. The question which arises upon the facts of the present case is whether a person who publishes matter which would be defamatory if published of a real person, but which is intended by him to relate to a purely imaginary personage and not to any real person at all, can be made liable in an action for libel because witnesses come forward to say that they understood the matter so published to relate to the plaintiff. There is no authority for any such proposition, which is, moreover, contrary to the essential principles upon which the right of action for libel is based. It was not suggested for the plaintiff that either the writer of the alleged libel or the editor who passed it for publication knew of the plaintiff's existence, or that there was any intention to refer to him. It was an unlucky accident that the writer, in selecting a name for his imaginary personage, happened to hit upon one which might be supposed to denote the plaintiff. Upon the admitted facts the defendants are entitled to judgment.

Secondly, the learned judge misdirected the jury, for he, in

substance, told them that although the alleged libel was not in fact intended to relate to the plaintiff, yet, if persons reading it might reasonably think that it related to him, they might find a verdict for the plaintiff. This direction was incorrect; the judge really applied a doctrine which is applicable to the meaning of words to a different subject-matter to which it is inapplicable, that is, to the identity of the person of whom the libellous matter is published. So far as the meaning of words is for the jury, it would no doubt be a correct direction to tell them that a man who publishes words must prima facie be taken to have used them in the sense in which ordinary, reasonable people would understand them; but this doctrine has no application to the question which arises in the present case. The whole basis of the cause of action in libel is that the libel was maliciously published by the defendant in relation to the plaintiff. Malice is the gist of the action of libel. Malice is, no doubt, implied by law, in the absence of privilege, from the publication of the libel, but the implication must be in regard to a particular person to whom the defendant intended to refer. It is impossible to imply malice where the defendant in truth intended to make the statements which he published with regard to an imaginary personage and not to any real person. The name selected in the present case was exceptional, but a less uncommon name might have been selected. It is conceivable that in such a case different readers might reasonably understand the statements published as referring to different persons. It would follow, if the plaintiff can maintain this action, that any persons who could shew that those who knew them reasonably understood the statements as referring to them could each of them maintain a separate action of libel in respect of the same statements. Such a consequence shews that the plaintiff's contention cannot be well founded. Of course the fact that readers understood the alleged libel to refer to the plaintiff might be evidence that the defendant intended to refer to him, and if, upon a proper direction of the judge, the jury in such a case disbelieved the defendant's assertion that the statements published by him referred to an imaginary personage and not to the plaintiff, there would be an end of the case; but here the case has to be dealt with on the hypothesis that the

C. A. 1909

JONES v. E. HULTON & CO.

alleged libel was in fact not intended to refer to the plaintiff. It is to be observed that, apart from the name used, none of the details with regard to the imaginary personage described in the libel were applicable to the plaintiff, inasmuch as he is not a married man, nor a churchwarden, nor a resident of Peckham; nor was he either a frequenter of Dieppe or there at the time when the scene described in the alleged libel took place. There cannot be a libel without malice either in fact or in law towards any one. It is impossible to libel a person of whose existence one is not aware. If the action will lie in the present case, then, whenever in a play or a novel any personage is portrayed of an undesirable character, any one may maintain an action against the author if he can shew that, owing to the name used or other details, some persons were led to believe that he was the person to whom reference was made, though the author may not have known of his existence and may not have intended to refer to any real person. It may be that there are, perhaps, in some cases dicta capable of being construed as pointing to the possibility that, if a defendant did, in publishing libellous matter, intend to refer to a really existent person, and used terms which might reasonably be understood as identifying the plaintiff with that person, the action would lie, though the defendant did not in truth mean to refer to the plaintiff. It is submitted that it is at least doubtful whether that view could be supported; but there is really no authority whatever for the proposition that where not only was the defendant not intending to refer to the plaintiff, but the personage of whom the statement complained of was made was wholly imaginary, an action of libel could be maintained. In *Harrison* v. *Smith* (1) the alleged libel appears to have referred to a real personage, though the writer supposed the name by which he described him to have been an assumed name. In any event the damages were excessive. [They also cited *Emmens* v. *Pottle* (2); *Le Fanu* v. *Malcomson* (3); *Rex* v. *Lord Abingdon* (4); *Bromage* v. *Prosser* (5); *Bourke* v. *Warren* (6);

(1) (1869) 20 L. T. (N.S.) 713.
(2) (1885) 16 Q. B. D. 354.
(3) (1848) 1 H. L. C. 637.
(4) (1794) 1 Esp. 226.
(5) (1825) 4 B. & C. 247.
(6) (1826) 2 Car. &P. 307.

Latimer v. *Western Morning News* (1); *Du Bost* v. *Beresford* (2); *Reg.* v. *Barnard.* (3)]

Montague Lush, K.C., and *Gordon Hewart*, for the plaintiff. The argument for the defendants treats the case as if the action were against the writer of the libellous article. It is immaterial for the present purpose what the writer of the article meant or knew, whether he knew of the plaintiff's existence, or intended to refer to him, or not. The action is against the company, who take the risk of publishing the statements complained of for the purpose of pecuniary gain to themselves. It is a novel proposition that in such a case the company, who have, through their agents, published defamatory matter of a person whom they have denoted by name to the public, can be heard to say that they did not know of the existence of such a person and that the statements were meant by the writer to refer to a fictitious personage. Malice in law merely means that a wrongful act has been done without legal justification or excuse. This is a case not of a play or a novel or other such work of fiction, in which the characters may prima facie be presumed to be fictitious, but of a newspaper which purports to deal with facts. The scene as described by the writer purported to be what he himself witnessed at Dieppe. If, in such a description published in a newspaper, the owners of the newspaper take upon themselves to state as facts defamatory matters with regard to a person whom they denote by name or otherwise, in such a manner that ordinary readers might reasonably conclude that the plaintiff was the person denoted, there is in law an implication of motive, and all the essential conditions requisite to give a cause of action for libel are satisfied. The contention for the defendants really involves the conclusion that, if the publisher of a libel, meaning to publish a defamatory statement with regard to A., by a slip, or by reason of a mistake as to names, publishes the statement with regard to B., of whom he did not intend in his own mind to publish it, though the result may be the ruin of B., the latter has no remedy against the publisher of the libel because there was no

(1) (1871) 25 L. T. (N.S.) 44. (2) (1810) 2 Camp. 511.
(3) (1879) 43 J. P. 127.

C. A. 1909

JONES v. E. HULTON & Co.

malice on his part towards B. It is not necessary in such a case that there should be any malice, either implied or express, in the sense of any spite against B.; it is sufficient that without legal excuse defamatory matter should have been published concerning him. The general principle applies that a man must be taken to have intended that which is the natural result and meaning of what he does or says, and cannot be heard to say that in his own mind he had not that intention. It was for the jury in such a case to say whether, having regard to the terms of the libel, it would reasonably be understood by readers to apply to the plaintiff. A man's intention must be judged of by what he says and does, and the language he uses must bear the meaning which the ordinary reader would place upon it. The principle referred to by Lord Macnaghten in *Keighley, Maxsted & Co.* v. *Durant* (1) is applicable to all cases of civil obligations. The intention of the writer, still less that of the person who publishes the libel by selling the newspaper containing it, cannot be the proper test to apply. In the case of a libel in a newspaper a jury is properly guided by the views of those who read it, and not by the intention of the writer. There was no misdirection; on a fair reading of the summing up it is plain that the question of malice was left to the jury. The damages were not excessive; the evidence called shewed that the libel caused great harm to the plaintiff in his profession. The amount of damages in an action of libel is essentially a matter for the jury, and there are no materials to shew that in the present case the jury were perverse in awarding the sum which they did. [They also cited *Shepheard* v. *Whitaker* (2); *Capital and Counties Bank* v. *Henty*. (3)]

Rufus Isaacs, K.C., in reply. There was no evidence of malice on the part of the defendants. Negligence is not malice, and though negligence may be taken into account in an assessment of damages, it cannot by itself give rise to a cause of action founded on malice. It has not been proved that the alleged defamatory matter was published of and concerning the

(1) [1901] A. C. 240, at p. 247. (2) (1875) L. R. 10 C. P. 502.
(3) (1882) 7 App. Cas. 741.

plaintiff. In order to determine whether the statements were published of the plaintiff it is not permissible to go into the surrounding circumstances with a view of ascertaining the meaning of the document; evidence is not given to shew what the document meant, but who the person is that is mentioned in order to identify him.

Cur. adv. vult.

May 24. LORD ALVERSTONE C.J. read the following judgment:—This was an appeal in an action for libel tried before my brother Channell and a special jury at the Manchester Assizes. The action was brought by the plaintiff, a member of the Bar, in respect of a libel published in the *Sunday Chronicle* on July 12, 1908 (the passages complained of are set out in the statement of claim), which appeared in an article in the defendants' paper purporting to describe what the Paris correspondent of the paper had witnessed at Dieppe, and the particular passage on which the question really turns was in these words: "'Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!' whispers a fair neighbour of mine excitedly into her bosom friend's ear. Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad?" It was alleged by the plaintiff that this passage was a libel upon him.

The material facts which were proved in evidence at the trial were as follows. The plaintiff, whose real name is Thomas Jones, is thirty-seven years old, and since the year 1901 has been a member of the Bar, practising on the North Wales Circuit. His baptismal name was Thomas Jones, but ever since he was at school he has been known by the name of Artemus Jones or Thomas Artemus Jones. He was confirmed in the latter name in the year 1886, and it appears to have been given him by his father in order to distinguish him from other persons of the name of Jones. The defendants alleged that the name was used as a fictitious name adopted by the writer of the article without any knowledge of the existence of the plaintiff or of any person named Artemus Jones; and both the writer and the editor, who were called as witnesses by the defendants under

C. A. 1909

JONES v. E. HULTON & CO.

Lord Alverstone C.J.

circumstances to which I shall have to refer, stated that they had no knowledge whatever of the plaintiff, and had no intention to refer to him, and that so far as they were concerned the name was entirely an imaginary name. The counsel for the plaintiff accepted the explanation given by the writer, Mr. Dawbarn, and the editor, Mr. Woodbridge, and expressly stated that he did not, after their evidence, allege that they or either of them were in fact actuated by malice, or intended to refer to the plaintiff in their article. Some question was raised both at the trial and on the appeal before us as to the possibility of there being other individuals in the employment of the defendant company who were actuated by express malice towards the plaintiff, but for the purpose of my judgment I assume that there was no proof of malice in fact on the part of any agent or servant of the defendants. The plaintiff called five witnesses who stated that upon reading the article they thought that it referred to the plaintiff, and the plaintiff was prepared to call further witnesses to give evidence to the same effect, but, at the suggestion of the learned judge, he abstained from calling them.

It was contended by the defendants that inasmuch as it must be taken that there was no intention to refer to the plaintiff, and that the only words which could connect the article with him were the name Artemus Jones, the action could not be maintained, inasmuch as the plaintiff failed to prove that the defendants falsely and maliciously published the libel of and concerning the plaintiff; but this contention, in my opinion, involves a fallacy. If an untrue and defamatory statement in writing is published without lawful excuse, and in the opinion of the jury upon the evidence it refers to the plaintiff, the cause of action is made out: see notes to Bullen and Leake, 3rd ed., p. 304. No one doubts that the averment that the libel was written of and concerning the plaintiff is a material averment. The authorities cited by my brother Fletcher Moulton establish that proposition, but in my opinion no authorities are necessary; it has been so held for generations; but here the averment was made, and the question is whether the averment was proved; and that, as well as the innuendo founded thereon, was for the jury upon the evidence. At the conclusion of the plaintiff's case, Mr. Langdon, who was

then the leading counsel for the defendants, submitted that, as the name Artemus Jones was a fictitious name, coined by the writer of the article, and not intended to refer to any particular individual at all, it was not a libel on anybody, and a fortiori not on the plaintiff himself. In support of this contention the case of *Harrison* v. *Smith* (1) was at that stage of the proceedings cited to the learned judge. He ruled that, if a person chooses to publish a thing of this description, the question is not whether the man really intended it, but whether it would be understood by readers to apply to a particular person, adding that, if sensible readers would see at once that it was only an imaginary thing, if any one reading it would see that it did not refer to a gentleman who happened to bear the name of Artemus Jones, it would not be a libel, but if he would think the contrary, that it did not refer to an imaginary person, but to a real individual, the action might be maintained.

It is in my opinion clearly established by authorities, to some of which I will refer, that the question, if it be disputed, whether the article is a libel upon the plaintiff, is a question of fact for the jury; and in my judgment this question of fact involves not only whether the language used of a person in its fair and ordinary meaning is libellous or defamatory, but whether the person referred to in the libel would be understood by persons who knew him to refer to the plaintiff. This proposition is so well established that, but for the grave and strenuous argument addressed to us on behalf of the defendants, I should not have thought it necessary to refer at any length to the authorities which support the proposition. It was, however, contended that there was a distinction between the identity of the person supposed to be referred to in the article and the defamatory language used about that person. I know of no case in which this distinction has been drawn, but it seems to me, both upon authority and principle, that, both on the question of whether the alleged libel refers to the plaintiff and as to the meaning of the language used, the question is for the jury upon the evidence before them.

It seems to me that a very brief consideration will shew that

(1) 20 L. T. (N.S.) 713.

C. A. 1909

JONES v. E. HULTON & Co.

Lord Alverstone C.J.

on principle this must be so. Take the case of a libel which uses a name; that name may or may not be conclusive as to the person to whom the libel is intended to refer. Just in the same way, if the libel speaks of a person by description without mentioning the name, in order to establish a right of action the plaintiff must prove to the satisfaction of a jury that ordinary readers of the paper who knew him would have understood that it referred to him. There is abundant authority to shew that it is not necessary for every one to know to whom the article refers; this would in many cases be an impossibility; but if, in the opinion of a jury, a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him, in my opinion an action, assuming the language to be defamatory, can be maintained; and it makes no difference whether the writer of the article inserted the name or description unintentionally, by accident, or believing that no person existed corresponding with the name or answering the description. If upon the evidence the jury are of opinion that ordinary sensible readers, knowing the plaintiff, would be of opinion that the article referred to him, the plaintiff's case is made out.

Upon the question whether or not the readers of the paper, reading this article, would think that it referred to the plaintiff, it is, in my judgment, necessary to state certain other facts which were proved in evidence and not disputed by the defendants. The plaintiff had for six or seven years been a contributor to the paper. He had on several occasions published articles in the paper signed "T. A. J." There was evidence upon which the jury might well come to the conclusion that his name and personality as Artemus Jones were well known to many readers of the *Sunday Chronicle*. He had been since 1901 a barrister on the North Wales Circuit, and had met with very considerable success. He was known on that circuit, and by the reports of his cases in the local papers, as Mr. Artemus Jones, and there was evidence, as I have already said, that readers of the paper on reading the article thought that it did refer to him. It was alleged by the defendants that the article on the face of it related to a fictitious person, and that no reasonable person could think that the article referred to any one. This was, in my opinion,

for the jury; but there certainly was evidence from the article itself that the writer was purporting to describe that which he had himself seen, and people whom he had himself observed. The writer admitted that he had intended to describe under a fictitious name people whom he had seen. But, as I have already said, I think this is quite immaterial and ought not to be used against the defendants. No doubt any person who knew the plaintiff intimately, and read the whole of the article carefully, would come to the conclusion that it did not refer to him, because he did not live at Peckham and was not a churchwarden. But this again was for the jury, and it might well be that the article would be read by persons who knew the plaintiff by the name of Artemus Jones and by repute and from his public life and position, and did not know in what part of London he resided or whether he was or was not a churchwarden. Mr. Hulton, a witness called for the defendants, connected with the defendants' paper, who knew the plaintiff, said that at first he was surprised at the name appearing as it had, but that on reading the article he came to the conclusion that it could not refer to the plaintiff.

Dealing now with the authorities, it is, I think, beyond dispute that, apart from the question of express malice, the intention or motive with which the words are used is immaterial, and that, if in fact the article does refer, or would be deemed by reasonable people to refer, to the plaintiff, the action can be maintained, and proof of express malice is wholly unnecessary: see the judgment of Lord Bramwell in *Abrath* v. *North Eastern Ry. Co.* (1), in which the following passage occurs:—"That unfortunate word 'malice' has got into cases of actions for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed

(1) (1886) 11 App. Cas. 247, at pp. 253, 254.

C. A. 1909

JONES v. E. HULTON & Co.

Lord Alverstone C.J.

books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill-will or motive." What is passing in the mind of the writer is wholly immaterial, or what was his intention, if he has in fact published a libel upon the plaintiff: see the cases collected in cap. v. of Odgers on Libel and the judgment in *Bourke* v. *Warren* (1), where Abbott C.J. in summing up to the jury said: "The question for your consideration is, whether you think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." The judgment of the House of Lords in *Le Fanu* v. *Malcomson* (2) involved the same proposition, and in my opinion the statement of the law by Lord Blackburn in the case of *Capital and Counties Bank* v. *Henty* (3) is conclusive of the point: "In construing the words to see whether they are a libel the Court is, where nothing is alleged to give them an extended sense, to put that meaning on them which the words would be understood by ordinary persons to bear, and say whether the words so understood are calculated to convey an injurious imputation. The question is not whether the defendant intended to convey that imputation; for if he, without excuse or justification, did what he knew or ought to have known was calculated to injure the plaintiff, he must (at least civilly) be responsible for the consequences, though his object might have been to injure another person than the plaintiff, or though he may have written in levity only." It follows from these decisions that, if a corporation publish a libel, it is for the jury to say on the evidence whether it be a libel upon the plaintiff. It was contended that the language of Lush J. in the case of *Harrison* v. *Smith* (4) is inconsistent with this view. In my opinion that cannot be successfully maintained. I understand

(1) 2 Car. & P., at p. 309.
(2) 1 H. L. C. 637.
(3) 7 App. Cas. 741, at p. 772.
(4) 20 L. T. (N.S.) 713.

Lush J. to have ruled that although the defendant thought that the name used was a fictitious name, still, if the article would be understood to refer to the plaintiff, the defendant was liable.

We were further asked to direct a new trial on the ground that the damages were excessive. There is in my judgment no ground for interfering with the finding of the jury in this respect. Assuming for this purpose that the jury were right in coming to the conclusion that the libel would be understood by those who knew him to refer to the plaintiff, it charged him, a young man, with grave immorality; and one has only to read the plaintiff's evidence as to the annoyance the article had occasioned to him and the evidence of some of the witnesses called on his behalf to come to the conclusion that they at any rate regarded it very seriously. Opinions upon such questions vary very much. Some people may regard an allegation of immorality of the kind as comparatively immaterial; others, particularly amid such surroundings as those in which the plaintiff has lived, may well consider it a very serious blot upon his character, and would be unwilling that he should have the conduct of their business. Whether the paragraph which appeared in the defendants' paper of July 19 was or was not a sufficient expression of regret was entirely for the jury. It is possible, as I have already said, as the case was conducted, that the jury were not altogether satisfied with the explanation given by the defendants. But, be that as it may, and even assuming that in favour of the defendants, I am not prepared to say that the assessment of damages is such that a new trial ought to be ordered.

It was suggested that my brother Channell had misdirected the jury in that he had withdrawn from them the question of whether the libel referred to the plaintiff, and had in some way directed them that they must find for the plaintiff. From this point of view I have most carefully considered the learned judge's summing up. In the first place, in my opinion his ruling at the conclusion of the plaintiff's case was quite right. Then the defendants' counsel submitted that, because the article related to a fictitious person, no action could be maintained. I

C. A. 1909

JONES v. E. HULTON & Co.

Lord Alverstone C.J.

think that my brother Channell properly declined to stop the case. His final direction to the jury is to be found in the summing up, upon the basis of which the jury proceeded, they having been addressed by the learned counsel on both sides, and Mr. Langdon having contended that they ought to find that the article was purely fictitious and did not in any way relate to the plaintiff. In my judgment this question was distinctly left to the jury, and in no way withdrawn, and I would refer to the passages on pages 4, 6, 7, and 9 of the summing up, in which my brother Channell told the jury, in my opinion in clear and correct language, that if they thought the article only referred to a fictitious person, and not to an existing individual, they ought to find for the defendants, but that if in their judgment it would be understood by persons who knew the plaintiff to refer to him, they ought to find for the plaintiff. In my opinion this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. read the following judgment:—The ruling of the learned judge in this case is of such wide application, and strikes so directly at what I believe to be the foundations of the English law of libel, that, before dealing with the facts, which to my mind make it an ordinary case of no special difficulty, I propose to examine generally the law relating to libel so far as it deals with the necessity of the plaintiff's proving that the defendant intended the defamatory matter to apply to him.

The action of libel is a very ancient action for a tort at common law. The essentials of such a cause of action appear from the well-known form of the declaration, a form which itself must have been in use for centuries. It ran thus: "That the defendant falsely and maliciously wrote and published of and concerning the plaintiff the words following, that is to say, 'he (meaning the plaintiff) is," &c. To support such a declaration the plaintiff must prove that the words alleged were written and published of him by the defendant. Having satisfied this onus, he succeeds in the action if the words bear naturally a defamatory meaning or must be understood in a defamatory sense by reason of circumstances attending the writing and publication; for the

law under such circumstances presumes malice and damage, unless the occasion was a privileged one or the defamatory matter true.

That it was necessary, in order to succeed in such an action, that the plaintiff should shew that the words were written and published of him by the defendant follows to my mind from the language of the declaration itself, and until the present case I never heard of any doubt being thrown upon the proposition, for the language of Lord Bramwell in *Abrath* v. *North Eastern Ry. Co.* (1) refers to a different point—the implication of malice; and the other cases cited by the Lord Chief Justice deal with the meaning of the words used or the motives for using them and not in any way with the question of their being intended to refer to the plaintiff. It is, of course, an issue of fact to be found by the jury on all the evidence in the case. The libel itself will form an important part of that evidence, but any other relevant evidence may be adduced alike by plaintiff and defendant. At the present moment I do not propose to discuss the nature of this evidence. The important question is the issue which the jury has to decide by its aid, which is, "Aye or No, did the defendant write and publish the words of the plaintiff?"

I have said that to my mind the very form of the declaration shews conclusively that the plaintiff must succeed on this issue to support the action. But it is not necessary to rely on any such inference. From very early times it was recognized that it was essential for the plaintiff to allege and prove that the defendant wrote or spoke the defamatory matter "of and concerning" him. The absence of the averment (well nigh in these very words) was consistently held by the Courts to be fatal, not as a mere irregularity of pleading such as could be dealt with by special demurrer, but as a matter of substance which was of the essence of the case and could not be cured by verdict. This was fully recognized as far back as the reign of James I., and probably much earlier, and was regularly acted on. The case of *Lowfield* v. *Bancroft* (2) and the case in 1 Rolle's Abridgment, p. 85, are cases in which Courts of Error set aside judgment in

(1) 11 App. Cas. 247, at pp. 253, 254. (2) (1732) Str. 934.

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

actions of libel because in the count it was not alleged that the defendant wrote or spoke the words "of and concerning" the plaintiff. A striking instance of the view that the Courts held of the necessity of this averment is given by the case of *Johnson* v. *Aylmer* (1), in the time of James I. The action was brought by one Jeremy Johnson against Sir John Aylmer for slander. The declaration did not aver that the words had been spoken by the defendant "of and concerning the plaintiff," but it set out the libel in the following way:—"Mr. Price, you do my Lord Burleigh wrong that you do not apprehend Jeremy Johnson (innuendo the plaintiff) for a felon. . . . ." The jury found a verdict for the plaintiff for 50*l*. The defendant moved in arrest of judgment on the ground that the words were not alleged to be spoken of the plaintiff, and that this was a fatal defect not cured by inserting the innuendo in reciting the libel. The Court so decided, and accordingly set aside the judgment, thus asserting in the strongest way that, no matter what the libel might contain or might be alleged to mean, the action would not lie unless it was averred and proved that the words were spoken "of and concerning the plaintiff." The reason why the Courts insisted so positively on the presence of this averment appears plainly from the judgment of Lord Mansfield in the case of *Rex* v. *Horne*. (2) He there says: "The gist of every charge of every libel consists in the person or matter of and concerning whom or which the words are averred to be said or written." He cites in support of this the case of *Rex* v. *Alderton* (3), in the time of George II. This was a case precisely similar to *Johnson* v. *Aylmer* (1), except that it was an indictment instead of an action, a difference which the cases shew to have no bearing on the point with which I am now dealing. It was a libel on the justices of Suffolk. The information omitted to allege that the words were written "of and concerning the justices," but in reciting the libel it inserted the innuendo "meaning the justices of Suffolk." The jury found a verdict of guilty, but on a motion for arrest of judgment the Court of Error set the judgment aside holding that the omission of the averment that the words were

(1) (1607) Cro. Jac. 126. (2) (1777) Cowp. 672, at p. 679.
(3) Pasch. 29 Geo. 2, B. R.

written "of and concerning the justices" was fatal and was not cured by the insertion of the innuendo in the libel itself. In the case of *Rex* v. *Horne* (1), to which I have referred, a writ of error was brought, and carried to the House of Lords, and the judges were called in to advise. Grey C.J. delivered the unanimous opinion of the judges, and in it he cites and follows the decision in this case of *Rex* v. *Alderton* (2), and the House of Lords accepted the view of the judges. It is difficult to conceive any higher sanction to the proposition that it is essential that it should be averred and proved that the words were written or spoken "of and concerning the plaintiff."

Inasmuch as the procedure of error and motions in arrest of judgment has now passed away, it is worth while to spend a moment in examining the precise legal effect of these decisions. In all these cases the verdict of the jury was "guilty," and in moving in arrest of judgment the defendant had to admit that the verdict conclusively established that everything alleged in the count had been duly proved. These cases shew, therefore, that the action of defamation does not lie at all unless the plaintiff has proved that the defendant wrote or spoke the words "of and concerning the plaintiff." It is this which gives the exceptional significance to such a case as *Rex* v. *Alderton*. (2) The relators there strove to say that they had made up for the omission by inserting in the libel the innuendo that the words meant the relators. But the Courts held that no innuendo could cure the fatal defect of not having obtained the verdict of the jury that the defendant wrote the words of and concerning the relators. In no way could the legal procedure of that day more formally put on record the view that unless a defendant has written or spoken the defamatory words "of and concerning the plaintiff" he cannot be guilty of defamation, no matter what those words be or what they may be alleged to mean. In the absence of a finding of the jury to that effect the Court declined altogether to consider the words complained of.

But it must not be thought that the importance of this averment was only recognized in times long past. It has always, so far as I can find, been equally insisted upon. In *Rex* v.

(1) Cowp. 672, at p. 679. (2) Pasch. 29 Geo. 2, B. R.

C. A.
1909
JONES
v.
E. HULTON & Co.
Fletcher Moulton L.J

Marsden (1) the Court made absolute a rule in arrest of judgment after verdict because in the declaration it was not averred that the words were printed and published "of and concerning the plaintiff," although it could not be doubted that the pleader had intended the indictment to bear that meaning. In his judgment Lord Ellenborough C.J. says: "In this instance I daresay the omission has been through a mistake, and if I could find any words of equivalent import I should be unwilling to arrest the judgment. But the words 'of and concerning' are very material words, the importance of which has been pronounced by a Court of the highest resort. There may, perhaps, be words of equivalent import—but I should not advise them." Other decisions of Courts of Error could be cited to the same effect. And the necessity of the averment in substance is shewn by all the cases which turn upon the existence and effect of the colloquium in actions of slander, which is familiar to those who take an interest in the history of English pleading, but to which I need not further refer.

Thus far I have been dealing with the necessity of the averment that the defendant wrote and published the words "of and concerning the plaintiff." Its meaning is so clear and unmistakable that I cannot conceive any other interpretation being put upon it than the natural meaning which the words bear. Certainly no other meaning is suggested in any reported case. No one has suggested that it means anything but what it says. Accordingly there are few cases which deal specifically with the meaning of the averment. But occasionally the question turns up indirectly, and the utterances of the Courts are entirely in accordance with the plain meaning of the language of the averment. The case of *Le Fanu* v. *Malcomson* (2) in the House of Lords illustrates this. The plaintiff in that case was owner of a factory in Ireland, and the defendant had published a letter about Irish factories in which he had said, "The cruelties of the slave trade or the Bastille are not equal to those practised in some of the Irish factories." The declaration alleged that these words were composed and published "of and concerning" the plaintiff, and that the "factories" meant the plaintiff's factories.

(1) (1815) 4 M. & S. 164. (2) 1 H. L. C. 637.

At the trial the jury returned a general verdict for the plaintiff with 500*l.* damages. The defendants brought a writ of error to set aside the judgment, substantially on the ground that the libel contained no allegation against the plaintiff, because it only spoke of the factories as a class and did not name or refer to the plaintiff's factory specifically. Lord Cottenham, in upholding the judgment, says: "The declaration after introducing those words has the innuendo, 'meaning the factory of the plaintiffs' and the jurors have, by finding a verdict for the plaintiffs, found that the words were used in allusion to the factory of the plaintiffs. In that state the question arose below and arises here whether the judgment founded on that verdict can be maintained on such a declaration; that is to say, where terms are used which must have reference to some one (for the term 'some of the Irish factories' must evidently mean to apply to some Irish factories); and the innuendo is that the words do apply to the plaintiff's factory, and the jurors have found that that innuendo is true, and that the plaintiffs, who are the proprietors and owners of a factory in Ireland, were the persons meant." A little later he says: "If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." To my mind, no language could more clearly express the view that the issue which the jury had to decide was to whom the libel was intended to refer, and that by their verdict for the plaintiff they had found that it was in fact intended to refer to the plaintiff. The opinion of Lord Campbell, the other member of the Court, is to the same effect. He says: "It may well happen that the singular number is used; and where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name or

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done as would be done if his name and Christian name were ten times repeated." This clearly shews that he considered that the question to whom the slander is intended to refer, or, as he expresses it, "the person who is aimed at," is the question of fact to be determined by the jury on the evidence laid before them.

It is therefore, to my mind, settled law that a defendant is not guilty of libel unless he wrote and published the defamatory words "of and concerning the plaintiff"—in other words, unless he intended them to refer to the plaintiff. The ruling of the learned judge in the present case is directly contrary to this. He says "It does not matter what he intended," and has directed the jury that they may find the defendant guilty of libelling the plaintiff although he did not know of his existence and had never written a word "of and concerning him" in his life. He has substituted for the plain issue which the common law has alone known, throughout three centuries at least, an issue which is in substance expressed thus: "Is there a class of persons who might reasonably suppose the words to be written of and concerning the plaintiff?" That this can be the meaning of the old common law averment is to my mind impossible. It must be remembered that we are dealing with the old common law action of libel and nothing more. The tort for which an action of libel can be brought must be the same now as it always has been, and to support the ruling of the learned judge we must say that this extraordinary issue has always been the meaning of the plain and necessary averment that the defendant "wrote and published the words of and concerning the plaintiff." The old system of pleading at common law has been rightly done away with, because the price paid for its punctilious accuracy was too heavy. But it had great merits, and, in my opinion, increased laxity of thought has followed the increased laxity of statement in our present pleadings. One great merit of the old common law pleading was that it left no doubt as to the essentials of such causes of action as it recognized, and insisted

on their being duly and correctly stated. To say that when the common law required it to be alleged and proved that the defendant wrote and published the words of and concerning the plaintiff it meant only that it must be shewn that some people might think so is, to my mind, to give up all pretence of interpreting language and arbitrarily to create new torts which the law never did and does not now recognize as such.

This attempt to get away from the plain meaning of the recognized issues in the common law action of defamation, and thus to impute to a man a tort of which he is entirely innocent in intention, is not the first instance of an attempt to introduce a doctrine of constructive torts into common law. There was a period when there was a formidable attempt to alter the plain issue of fraud in the common law action of deceit by introducing the doctrine that a man must be held responsible in such an action for the knowledge he possesses or ought to possess and for the language he uses, and that if he makes a statement not in accordance with such knowledge he must be taken to be guilty of fraud in the eye of the law, even though it be due to forgetfulness, mistake, imperfection of expression, or any other intellectual cause. The unanimous judgment of the House of Lords in *Derry* v. *Peek* (1) put an end to this and established that nothing had changed the nature of the old common law action of deceit, and that to be guilty of fraud you must have a fraudulent mind, and that fraudulent intention was an essential of the issue. Similarly in the case of the action of defamation. It is an action for speaking evil of your fellow, and, as the cases I have cited shew, to be guilty of it you must in the first place have spoken the words of him, i.e., have intended your words to refer to him. It is not an action based on some supposed negligence whereby you have said something which may mistakenly be taken by some persons to refer to a person or persons who may be unknown to you and of whom you were not speaking. I remember very well the arguments by which in the case of *Derry* v. *Peek* (1) it was unsuccessfully sought to extend the common law action of fraud. They were precisely those to which we were treated in the present case by counsel for the

(1) (1889) 14 App. Cas. 337.

C. A. 1909

JONES v. E. HULTON & CO.

Fletcher Moulton L.J.

plaintiff. It was said that the presence or absence of fraudulent intent did not make any difference in the damage caused, and that a man must be held responsible for his words and actions whatever be his intentions. The answer of the House of Lords to this argument was that the plaintiffs were pursuing their common law remedy of an action of deceit, and that fraudulent intent had always been essential to that cause of action and must be so still. A like answer must, in my opinion, be given here: it has always been essential to the common law action of defamation that the defendants should have written or spoken the words of and concerning the plaintiff, and it must be so still.

I have not dealt with other features of the common law as to actions of defamation, because they do not directly bear on the present question. But they are not without significance. I cannot believe that the law would have implied malice on the part of the defendant from the mere publication of the words if it contemplated that he might be innocent of any intention that they should refer to the plaintiff or even of any knowledge of the plaintiff's existence. The law as to the innuendo also illustrates very forcibly the importance which the law ascribed to the intention of the defendant. If the words were spoken of and concerning the plaintiff, the defendant was responsible for them taken in their natural meaning. But if the plaintiff asserted that they bore any other meaning than that which they would naturally bear, he must allege that the defendant meant them in that sense, and must prove it by evidence admissible against the defendant, usually, no doubt, from the libel itself and the circumstances of its publication. But nothing that could not be brought home to the knowledge of the defendant would be admissible to support the issue, because it depended on intention: it was an attempt to make a man liable for something other than the natural meaning of his words, and that could only be done, as the form of the count indicates, by shewing that he intended the words to have that meaning.

The limitation of the action of defamation to cases where the defendant has spoken or written the words "of and concerning the plaintiff" is not an example of the weakness of common law

remedies, but of their wisdom. It constitutes the protection of the innocent individual from being held guilty of defaming others of whom he has never intended to speak, and also from being himself defamed. On the one hand to hold a person responsible for every application that his words may bear in the minds of persons who either possess knowledge that he does not possess or are ignorant of that which he knows would be to put on him a burden too heavy to be borne. But on the other hand it constitutes the protection of the individual from being defamed, because it nullifies all attempts to libel by language which as a matter of construction cannot refer to the plaintiff, but which persons reading between the lines would understand to refer to him by reason of the surrounding circumstances. This is one of the most common forms of libel. No name is mentioned, or some name other than that of the person really meant is substituted. The surrounding circumstances are intentionally misdescribed. The reader, in order to discover the person referred to, must reject or alter part of that which is written. But all these devices are in vain to shelter a libeller, because the issue is not whether the language is, as a matter of construction, applicable to the plaintiff, but whether the writer intended it to refer to the plaintiff, and if he did so he is responsible if any one can discover his intention, however much in words he may have striven to conceal it. This great and beneficial amplitude of the remedy is, however, only possible because the law makes the intention to refer to the plaintiff the critical issue. If a man is to be liable for the interpretation put by any person on his words, he must be entitled to require that it should be an interpretation of his words as they stand. He cannot be held responsible for what people may think to be his meaning after rejecting such portion of his words as may not agree with their interpretation. If a man who, judged by the language actually used by him, has not referred to the plaintiff may have such portion of that language as they may think fit rejected as being a mere blind by each set of readers, and the rest alone used for the purposes of identification, and is to be held liable according to the result of this process, then we have actually attained in our system of legal procedure to the absurdity expressed in the

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

well-known farce where the magistrate solemnly warns the prisoners "Any statement you may make will be taken down, altered, and used against you."

I will now pass on to examine the particular facts of this case, which are simple and not in dispute. The plaintiff, whose baptismal name is Thomas Jones, is a barrister on the North Wales Circuit. It appears that, in view of that name being very common in Wales, the plaintiff, when he attained years of maturity, added, under the advice of his father, the name Artemus so as to distinguish him from his numerous namesakes, and has since been and still is known as Thomas Artemus Jones, which it appears is by some of his friends abbreviated into Artemus Jones. It is clear that the addition of the name Artemus was determined on because it was a very unusual name, so that it was most improbable that any other person would bear the name of Thomas Artemus Jones or Artemus Jones, and thus confusion would in future be prevented. The article complained of was written by Mr. Charles Dawbarn, a journalist residing in Paris, who has been a contributor for about two years to the *Sunday Chronicle*, which is a paper published in Manchester by the defendant company. The article purported to be a description of the motor races at Dieppe. The part complained of is fully set out in the statement of claim and I need not repeat it at length. It speaks of a person going about at the races with a woman of bad character, gives to him the name of Artemus Jones, describes him as a churchwarden at Peckham, and draws a contrast between Jones taking on "so austere a job as the duties of churchwarden" and being a ringleader of fast living at Dieppe. The article is written throughout in a tone of pronounced and even extravagant levity, and is of such a character that it is difficult for me to understand how any person of ordinary intelligence reading it could think that the name was intended to be that of a real person. The article was sent by Mr. Dawbarn in the usual way to Mr. Woodbridge, the editor of the newspaper, who read it, had it put up in type, read the proofs, and inserted it in the paper. He was solely responsible for the insertion of the article and was the only person through whose hands it passed, excepting of course the compositor and

the reader, whose duty it is to correct mere printers' errors. Mr. Dawbarn and Mr. Woodbridge both swore that at the time they did not know of the existence of the plaintiff or of anybody bearing the name of Artemus Jones. Their evidence on this point was not challenged, but, on the contrary, was quite frankly accepted as true by counsel for the plaintiff. It was admitted that no portion of the description of the person in the article corresponded to the plaintiff, excepting the name Artemus Jones. The way in which Mr. Dawbarn chanced to choose that name was described by him in evidence, and there is not the slightest reason for doubting the accuracy of his statement, nor was any suggestion made that it was otherwise than truthful. He said that he had gone down to the races in a motor car with an American friend, and they had on the way discussed the American humourist Artemus Ward. When he came to write the article he thought he would call the man Jones, and as the name Artemus stuck in his mind, he put the two together, thinking that it would be impossible for any person in real life to have such a name. It is evident, therefore, that the plaintiff and the writer of the article chose the name—the one to use as his own name, and the other to use as the name of the personage he was describing—for precisely the same reason, namely, that it was so extraordinary a name that no person in real life could have it.

The plaintiff at the trial called his father, a doctor at Denbigh, and some other persons from North Wales, who knew him personally, to say that they thought the article referred to him. No one of them suggests any reason for so thinking except the name. They knew one person of that name, and one only, and so they thought that it meant the plaintiff. It was not suggested that they thought that any other portion of the description was applicable to the plaintiff, and most of the witnesses knew that it was not applicable. But the learned judge put a stop to calling further evidence by the following most remarkable ruling: "The question for the jury is whether people who happened to know Mr. Artemus Jones and who happened to read the article would as reasonable men think it meant him." He thus takes the interpretation, not of the world at large, but of

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

the comparatively small class who knew of the plaintiff. The learned judge repeats this ruling several times in slightly different terms, so that there is no doubt either of his meaning or of the interpretation which the jury must have put on his words. He was referred to the case of *Harrison* v. *Smith* (1), in which Lush J., directing the jury in a case of libel, said: "In the first place you have to say whether this libel points to the plaintiff—that is to say, whether the plaintiff is the person at whom the writer intended to point." The learned judge then said: "I shall rule that, if a person chooses to publish a thing of this description, the question is really, not whether the man intended it—it does not matter what he intended—but whether it would be understood by readers to apply to a particular person." And again: "If you did not intend it, and it was a mere misfortune of yours to fix upon some individual name when you did not refer to that individual, and the writing unfortunately by accident libelled him, a jury probably would not give the same amount of damages as they would if they thought you knew him perfectly well because he had been in your service and you intended to hit at him. If they thought that, they would give very different damages from what they would in the other case. At the same time an action lies if you have libelled a gentleman when you did not intend it." In the summing up this ruling is repeated in various forms, but in all cases it amounts to a direction that the intention of the defendant is immaterial, and that if persons who knew of the existence of the plaintiff would think it was meant for him—the reason throughout being merely the identity of name—the verdict must be for the plaintiff. I will only quote one passage: "If you think that by what is somehow or other rather a misfortune than anything else they have happened to publish something which has seriously damaged the plaintiff, then it seems to me that, in the way in which this case has been put to you, you are bound to find for the plaintiff."

There is no necessity for me to deal with these rulings at length. Their purport is plain, and they are in direct contradiction of what I hold to be the fundamental principles of the

(1) 20 L. T. (N.S.) 713.

English law of libel. The learned judge directs that it is immaterial whether the defendant intended the words to refer to the plaintiff or not, and that if persons who know of the existence of the plaintiff might reasonably think they referred to him, the plaintiff is entitled to succeed. He holds that you may accidentally libel a man of whose very existence you do not know. In my opinion, an unintentional libel in this sense is as impossible in English law as an honest fraud, and the gist of the action is, as Lord Mansfield said, the person of and concerning whom the words are spoken or written. As Lord Kenyon said in his direction to the jury in *Rex* v. *Lord Abingdon* (1), "In order to constitute a libel the mind must be in fault."

If I am right in my view, the direction of the learned judge to the jury was so materially erroneous that the verdict cannot stand. But in my opinion this Court ought not to grant a new trial, but ought to enter judgment for the defendants on the ground that there was no case to go to the jury. This would be obviously the right course if the action was against the writer of the article, but as it is against the company it may require an examination of the position of a company with regard to an action of libel, and I therefore postpone it for a moment in order that I may first deal with some further questions arising out of the ruling of the learned judge. In the first place I wish to point out that the only connection of the words with the plaintiff here is the identity of the name Artemus Jones. The learned judge has directed the jury that, if the persons who knew the plaintiff might suppose the plaintiff to be meant, they are to find for the plaintiff. It is obvious that this would make the defendant equally liable to any other person of the name of Artemus Jones, for it is admitted that there is nothing else in the description which points to the plaintiff, and in fact that the remainder of the description is inapplicable to him. If this be the law, then a person who makes a statement about Mr. A. B. which is perfectly true, but which if not true would be libellous, can be made liable to every person of the name of A. B. except the person of and concerning whom the words were written. It is clear on the judge's ruling that it would be no defence to

(1) 1 Esp. 226.

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

say that the writer intended another Mr. A. B. and that it was true of him, because the learned judge says expressly that the defendant's intention is immaterial. The consequence is that persons seeing the libel who did not know of the existence of the Mr. A. B. to whom the statement referred, but who knew of the existence of some other person of that name, would be able to come and give the same evidence as was held by the learned judge to be sufficient to support the plaintiff's case in the present instance.

The same consequences might be true in many cases where the words were not defamatory of the person of whom they were spoken. An erroneous application may render innocent words defamatory. That Mr. A. B. devotes himself in his private life to spreading the doctrines of the Protestant Church might constitute a serious charge of hypocrisy if erroneously applied to an eminent Roman Catholic of the same name; and even the harmless domestic announcement that Mrs. A. B. had just had a baby might make a man liable to a grave charge of having accused a person of want of chastity if readers are at liberty from the similarity of name to apply it to a lady who was at the time a widow. It would indeed be a calamity if our English law of defamation burdened ordinary speech or writing with such a chaos of responsibilities.

But the suggestion that such responsibilities may arise from the use of a name gives occasion for even deeper and more fundamental considerations. A man has no monopoly in his name. If there had been one or more persons bearing the name of Artemus Jones in existence at the time when the plaintiff thought proper to add Artemus to his name, they could not have prevented him from doing so. Nor did his assumption of that name in any way interfere with the right of any other person to take that name if it should please him so to do. The law will prevent persons from using assumed names for the purpose of fraud, but that is all. And in a precisely similar way the possession or assumption of a particular name by one or more persons does not interfere with the right of any writer to use the name for one of his characters. The innocent use of a particular name by a writer for such a purpose is as legitimate an act as the innocent

assumption of it as his own name by a person dissatisfied with that given him in baptism. And the fact that a writer does so use a name does not warrant his words being taken to refer to any particular person called by that name, any more than the plaintiff's signing his name as Artemus Jones would make him guilty of forgery of the name of a person who had always borne that name. In the present case it is admitted that the writer of the article and the editor were in the same position with regard to knowledge of the existence of any person of the name of Artemus Jones as was the plaintiff when he assumed the name, and the fact that it was used in the article no more warranted the conclusion that the writer referred to the plaintiff than would the use of the name by the plaintiff warrant the conclusion that he was passing himself off as some other person of the same name if there chanced to be one. Indeed this would be too obvious to be contested if the name were an ordinary one; but a different law cannot apply to the innocent use by a writer of an ordinary and of an extraordinary name, unless we are to be guilty of the supreme absurdity of saying that the more pains a man takes to avoid causing annoyance to any person by the accidental use of his name, the more damning is the evidence against him in an action of defamation if by chance he has pitched upon the same name as has, unknown to him, been previously adopted on like grounds by some individual.

But the most serious aspect of the new doctrine is when we apply it to cases where the description is not by name. After all a name is only one means of identification, and, considering the millions of names that must exist in England and the improbability of any man's name being borne by him alone, is not a very strong one. There is no difference in the eye of the law with regard to an indication of identity by name and indication by other modes of description. Now suppose that no name is mentioned, but that the description is purely circumstantial. Let us take the case of a preacher or speaker who in denouncing some practice may introduce into his discourse some hypothetical case in order to render his meaning clear. Some detail innocently introduced by him, or even the choice of that particular theme, may lead his hearers to imagine that he is referring to

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

some particular person in the neighbourhood of whose existence and circumstances he is wholly ignorant and to whom personally he is not in any way referring. The learned judge clearly indicates that in that case he would be liable for defamation, and in fact says that he has already so ruled in another case tried before him. Nor do I see how a person could guard himself against such a liability or what defence he could raise. It is clear law that no omission of the name, or statement that it is a hypothetical case, or declaration that he does not intend to refer to anybody in particular, can or ought to protect a person so speaking whose intention is to libel. It could not therefore protect an innocent man under this ruling that intent is immaterial.

The major portion of the argument before us on behalf of the plaintiff consisted in urging that the ruling of the learned judge is only a case of applying the principle that a man must be held responsible for the ordinary meaning of the words he utters. A little consideration will shew this to be a fallacy. The principle which is referred to (which is not applicable when the cause of action depends on intent) must mean that he is bound by that which is the true construction of his words. But in the first place it is not pretended that as a matter of construction his words described the plaintiff. It is only either by rejecting the bulk of the description as a blind or leaving it out of consideration altogether that the description was made by the witnesses to apply to the plaintiff. And this is the more important, seeing that the part which they rejected is the really material part of the description. The actual name of the fictitious individual has no bearing on the point of the paragraph; that which is material is that the man who is guilty of light conduct abroad is a churchwarden at home. And this is the part which is rejected or disregarded by the people whose construction of the words published by the defendants is held to render the defendants liable. In the second place the identification of the name appearing in the article with any particular personage is not, strictly speaking, a matter of construction at all. Like all such questions it may, and very often must, be decided by extrinsic evidence. Every one knows

the maxim "Parcel or no parcel is a question for the jury." Even in contract, if A. sells to B. Blackacre, B. cannot compel A. to convey to him any close which goes by that name. If the name can refer to more than one close, B. must shew either by the rest of the description or by extrinsic evidence that the close he claims is the one to which the contract refers, and to do so it is not sufficient for him to shew merely that it is the one to which he thought the contract referred. Similarly in the present case the name in the article might refer to the plaintiff, or to some other person of the same name, or it might be a fictitious name used by the writer to denote the person of whom he was speaking. All these three are equally possible and equally legitimate, and to determine which of the three is to be taken one must have recourse either to the rest of the description or to extrinsic evidence as to which was the meaning in which it was actually used by the writer or the defendants. If recourse be had to either of these sources in the present case the unchallengeable result is that the words did not refer to the plaintiff. It is thus that, according to the ordinary principles of law, the question whether the words referred to the plaintiff must be decided, and not by the mere surmise of the reader. The ruling, therefore, of the learned judge is not in accordance with the principle of a person being held responsible for the words he uses. The doctrine of the old common law in the case of actions of defamation is far more nearly an application of those principles. But I do not wish it to be thought that in my opinion the doctrine of the old common law that the plaintiff must prove that the defendant wrote or spoke the words of and concerning the plaintiff is merely an example of the principle of holding a man responsible for his words. It went much deeper, because it regarded the liability as dependent on intent, and thereby on the one hand enlarged the responsibility of the individual by holding him responsible where intent was present, although on the words themselves there was no necessary reference to the plaintiff, and on the other hand, where the intent was absent, protected him, though the words themselves were such as might have referred to the plaintiff.

One point remains. It was suggested by counsel for the

C. A. 1909

JONES v. E. HULTON & Co.

Fletcher Moulton L.J.

plaintiff that this action would lie against the defendants who published the newspaper even though it would not lie against the writer of the article. I fail to understand the grounds on which this is suggested. Be the defendants who they may, it is equally necessary for the plaintiff to prove that they intended the words to refer to him. In this case they are an incorporated company. That company are responsible for the action of their editor. His intention for this purpose is theirs. But the editor is in this case as blameless as the writer, for he was equally ignorant of the existence of the plaintiff or of any person of that name. Counsel for the plaintiff attempted to suggest that the defendants were responsible because the compositor or the employees who read the proofs for printers' errors might have known of the plaintiff's existence. Whether they did or did not appears to me to have no bearing on the question whether the defendants published the article of and concerning the plaintiff. You cannot draw an inference as to the intention of the defendant company from the state of mind of any such subordinate servants who have no part in deciding on behalf of the defendants what shall and what shall not appear in the paper. I am therefore of opinion that there was no evidence to go to the jury in support of the plaintiff's case, and that judgment ought to be entered for the defendants.

A new trial is also asked for by the notice of appeal on the ground that the damages are excessive. Immediately after the article appeared complaint was made to the defendants, and accordingly in their next issue they inserted a disclaimer in terms which to my mind exactly meet the case and leave no possible doubt that the plaintiff was not referred to in the article. Seeing that it is admitted that the defendants were innocent of any defamatory intent, and that it cannot be pretended that any actual damage has been suffered by the plaintiff, the verdict of 1750*l.* is, even on the ruling of the learned judge, so absolutely perverse that on that ground alone the defendants are, in my opinion, entitled to a new trial.

FARWELL L.J. The appellants contend that the verdict and judgment in this case cannot stand, because it was proved that

neither the writer of the libellous article nor any person in the defendants' employment under whose notice it came before it was published knew or had even heard of the existence of the plaintiff, and that it therefore necessarily follows that the defendants cannot have intended the libellous words to apply to the plaintiff. The question for us is whether this contention is right.

The old declaration in an action for libel still accurately states the issues that have to be proved, namely, that the defendants falsely and maliciously printed and published of the plaintiff in the A paper (or as the case may be) the words following (setting them out), meaning thereby that the plaintiff, &c., &c. It is hardly necessary to say that actual malice is not necessary: malice in law is sufficient, and that is shewn by the falsity and defamatory nature of the words, as soon as it has been proved that they were written of the plaintiff. But the plaintiff has to prove (1.) the publication, and (2.) that it is of the plaintiff; and then he has to prove the libellous nature of the words, that is, the innuendo. It is contended that the libel cannot be published of the plaintiff if it be proved that his existence was unknown to the defendant. A plaintiff need not, of course, be named in the libel: it is sufficient if he be sufficiently described, and for this purpose recourse may be had to the innuendo. As Lord Campbell says in *Le Fanu* v. *Malcomson* (1), "It comes round to the old rule, that you cannot by an innuendo extend the natural meaning of the words which are spoken or written, but by the innuendo you may point out the particular individual to whom these words apply." The first step is to prove that the words published, whether by name, nickname, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers; the next step is to prove that that is the true intent and meaning of the words used. This is what I understand to be meant by Lord Cottenham in *Le Fanu* v. *Malcomson* (2): "If a party can publish a libel so framed as to describe individuals, though not naming them, and not specifically describing them by any express form of words, but still so describing them that it is known who they are, as the jurors have

(1) 1 H. L. C. at pp. 637, 668. (2) 1 H. L. C. at p. 664.

C. A. 1909

JONES v. E. HULTON & Co.

Farwell L.J.

found it to be here, and if those who must be acquainted with the circumstances connected with the party described may also come to the same conclusion, and may have no doubt that the writer of the libel intended to mean those individuals, it would be opening a very wide door to defamation, if parties suffering all the inconvenience of being libelled were not permitted to have that protection which the law affords. If they are so described that they are known to all their neighbours as being the parties alluded to; and if they are able to prove to the satisfaction of a jury that the party writing the libel did intend to allude to them, it would be unfortunate to find the law in a state which would prevent the party being protected against such libels." Lord Campbell (1) says: "Whether a man is called by one name, or whether he is called by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on, know well who is aimed at, the very same injury is inflicted, the very same thing is in fact done, as would be done if his name and Christian name were ten times repeated." It is, however, argued that when Lord Cottenham says "the writer of the libel intended to mean these individuals" he was referring to the intention in the writer's mind as distinct from the intention expressed in the words that he has used, as explained by the relevant surrounding circumstances. In my opinion this is not so, and I may remark that it was not the contention of the appellant's counsel in that case; he opened his case by asserting (2) that it was necessary to shew "that the libel on the record should point to the plaintiffs," &c. The rule is well settled that the true intention of the writer of any document, whether it be contract, will, or libel, is that which is apparent from the natural and ordinary interpretation of the written words; and this, when applied to the description of an individual, means the interpretation that would be reasonably put upon those words by persons who know the plaintiff and the circumstances. Lord Blackburn's speech in *Capital and Counties Bank* v. *Henty* (3) has already been read. It has been held that a mistake in the statement is no defence. Thus in *Shepheard*

(1) 1 H. L. C. at p. 668. (2) 1 H. L. C. at p. 664.
(3) 7 App. Cas. at p. 772.

v. *Whitaker* (1) the defendants' newspaper by mistake inserted the name of a trading firm under the heading of "First Meetings under the Bankruptcy Act" instead of "Dissolution of Partnership." The mistake was simply an error in setting up the type, but the defendants were held liable; and the same result might follow if the mistake had been in the name of the firm, for instance if they had intended to insert Smith & Co. and had in fact inserted Shepheard & Co., and this, too, whether the existence of that firm was or was not known to them. Before Lord Denman's Act in 1843 and Lord Brougham's Act in 1851 a defendant was not a competent witness, and the defendant could never have been called to state his intention. And in my opinion he cannot now be heard to say that he did not intend the true meaning of his own words as interpreted by relevant surrounding circumstances on the issue of publication of the plaintiff, although such evidence would be admissible in mitigation of damages as negativing express malice. It always was and is still open to him to prove the surrounding circumstances, so as to shew that, although the words appear to refer to the plaintiff, that is not their true intent and meaning. As Lord Blackburn says in *River Wear Commissioners* v. *Adamson* (2), "In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used." In the present case the jury have found that the libellous article described an actual scene at Dieppe, and that "Artemus Jones" mentioned therein described an actual person and not a mere type. If the defendants had proved in the present case not only that the writer of the article did not know of the plaintiff's existence, but also that there was an Artemus Jones other than the plaintiff, who was present at Dieppe in the company alleged, then the circumstances with reference to which the words

(1) L. R. 10 C. P. 502. (2) (1877) 2 App. Cas. 743, at p. 763.

C. A. 1909

JONES v. E. HULTON & CO.

Farwell L.J.

"Artemus Jones" were used would shew that the plaintiff was not the person intended; but the writer of the libel has chosen to state as a fact that Artemus Jones was present in order (as he says) to avoid the banality of using A. B. or a blank: he has, therefore, for his own purposes chosen to assert a fact of a person bearing the very unusual name of Artemus Jones, recklessly, and caring not whether there was such a person or not, or what the consequences might be to him.

An action for defamation differs from other actions, such for instance as trespass, in that it is of the essence of defamation that the plaintiff should be aimed at or intended by the defendant. The man who throws a squib into a crowd not intending to hit any one is liable for the consequences of his act, whatever his intentions may have been, because the two necessary constituents of tort, namely, a wrongful act by the defendant and actual damage to the plaintiff, are both present. But it is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances understand it to be written of him: he must also shew that the defendant printed and published it of him; for if the defendant can prove that it was written truly of another person the plaintiff would fail. To this extent I agree with Fletcher Moulton L.J., but we differ as to the meaning of the word "intended." In my opinion the defendant intended the natural meaning of his own words in describing the plaintiff as much as in the innuendo: the inquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances. For example, fraud is proved in an action of deceit not only when a false representation is made knowingly, but also when it is made recklessly, careless whether it be true or false, and although there was no intention to cheat or injure the person to whom the statement was made—*Derry* v. *Peek* (1)—and yet the fraudulent intent is of the essence of the action. So the intention to libel the plaintiff may be proved not only when the defendant knows and intends to injure the individuals, but also when he has made a statement concerning a man by a description by which the

(1) 14 App. Cas. 337, at p. 374.

plaintiff is recognized by his associates, if the description is made recklessly, careless whether it hold up the plaintiff to contempt and ridicule or not. In such a case it is no answer for the defendant to say that he did not intend the plaintiff, because he had never heard of him: he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby. The element of intention, which is as essential to an action of defamation as to an action of deceit, can be proved in the same way in both actions. The issue of fact is whether the plaintiff is the person intended by the libeller; but sufficient evidence to prove it may be given, although the defendant had no intention of injuring the plaintiff and had never heard of his existence. The squib thrower is liable for the injury done by his squib to the plaintiff, whether he aimed at or intended to hit him or not: the libeller is not liable to the plaintiff unless it is proved that the libel was aimed at or intended to hit him; the manner of proof being such as I have already stated. If the libel was true of another person and honestly aimed at and intended for him, and not for the plaintiff, the latter has no cause of action, although all his friends and acquaintances may fit the cap on him. If this were not so, no newspaper could ever venture to publish a true statement of A., lest some other person answering the description should suffer thereby. It is said that this would enable several plaintiffs to bring several and distinct actions in respect of one libel, and I think that this is so; but I am unable to see the objection. If the libel consisted in defamation of a number of individuals described generally, that is to say, "as the owners of some of the Irish factories" as in *Le Fanu* v. *Malcomson* (1), every member of the class who could satisfy the jury that he was a person aimed at and defamed could recover; and I can see no reason why two or more persons of the name of Artemus Jones who produced evidence from their acquaintances and others in different parts of the kingdom similar to that produced by the plaintiff in this case, the other circumstances being similar, should not recover. It is quite possible that a defendant might

(1) 1 H. L. C. 637.

C. A. 1909

JONES v. E. HULTON & Co.

Farwell L.J.

know two persons of the same name and might use words equally applicable to both, and describe each so that he appeared to his own circle of friends and acquaintances to be the person attacked, and might really intend to strike at both: it would certainly be somewhat shocking if such a man could successfully defend an action by one Artemus Jones by producing evidence that shewed conclusively that the other was aimed at, and then defeat an action by that other by producing evidence that shewed conclusively that the first was aimed at: the evidence in both cases would be true, and the libeller would escape because he had successfully libelled two persons in one libel. The case would be nearly as bad if the first plaintiff succeeded and the judgment obtained by him was held sufficient to defeat the action of the other person aimed at. If a man chooses to make statements of fact about persons whom he names, as in this case, I see no reason why he should not be liable to every one whom he injures who can convince a jury that he is reasonably intended by the words used.

I am therefore of opinion that the defendant cannot complain of Channell J.'s summing up. I do not think that he intended to rule anything more than that the alleged actual, as distinguished from the expressed, intention of the defendant was under the circumstances of this particular case immaterial. I do not understand him to have withdrawn from the jury the question whether the plaintiff was the person of whom the libel was published, which was, in my opinion, a question for them to decide, but to have ruled that the fact that any one of the plaintiff's names was unknown to the writer and to every one in the defendants' office through whose hands the libel passed was not a conclusive defence requiring him to stop the case; and in this he was, in my opinion, right. The ignorance was of course a material fact, both in considering the question of the true intent of the defendants and also in considering the damages, but I think that these were before the jury. It was said that there was some misdirection on the point of negligence, but I do not think that this is so. Negligence is immaterial on the question of libel or no libel, but may be material on the question of damages. The recklessness to which I have referred, founding

myself on *Derry* v. *Peek* (1), is quite different from mere negligence.

Then it is said that the amount of damages is excessive. It is no doubt large, but the evidence shews how serious the consequences have been and may yet be to the plaintiff. It is difficult to estimate the consequences of libel in a newspaper: as Best C.J. says in *De Crespigny* v. *Wellesley* (2), it may "circulate the calumny through every region of the globe." Those who read it may never read the subsequent explanation or the report of the trial; and some of those who read both may forget the result, and be left with a general recollection that the plaintiff was the man of whom a discreditable story was reported in a paper. Such newspapers as publish libellous statements do so because they find that it pays: many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages. The amount of damages is peculiarly their province, and I see no ground for interference. In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Nicol, Son & Jones, for Pickstone & Jones, Radcliffe.*

Solicitors for defendants: *Lewis & Lewis.*

(1) 14 App. Cas. 337.

(2) (1829) 5 Bing. 392, at p. 402.

W. J. B.

K. B. D.
1909
March 26.
C. A.
1909
May 12, 21.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

TURNER *v.* WALSH.

Landlord and Tenant—Lease—Mortgagor in Possession—Breach of Covenant to Repair—Right of Mortgagor to sue Lessee—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 10—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 5.

The Conveyancing and Law of Property Act, 1881, s. 10, gives to a mortgagor entitled to possession or to receipt of the rents and profits of land subject to a lease, whose mortgagee has neither taken possession nor given notice of his intention to take possession, the right to sue the lessee for damages for breach of a covenant to repair contained in the lease.

The Judicature Act, 1873, s. 25, sub-s. 5, gives the mortgagor no such right.

Trial of questions of law arising on the pleadings.

The statement of claim alleged that by an indenture of lease dated June 14, 1888, the Prudential Assurance Company, Limited, demised unto the defendant the land therein described with the messuage erected thereon and known as Lansdown House in the parish of Cuddington in the county of Surrey for a term of twenty-one years from September 29, 1887. The said indenture of lease contained (inter alia) covenants by the defendant to keep the said premises in good and substantial repair during the term, and to surrender to the lessors the premises being so repaired at the end or other sooner determination of the term. On May 21, 1906, the Prudential Assurance Company, Limited, by deed duly conveyed (inter alia) the land and messuage aforesaid with the benefit of the aforesaid covenants entered into by the defendant to the plaintiff. The defendant committed breaches of the aforesaid covenants during the term. By reason of the defendant's neglect to perform the aforesaid covenants and execute the said repairs as provided by the said indenture of lease the plaintiff would suffer damage during the period reasonably necessary for the execution of the same and would lose three months' rental of the said premises, and he claimed

70*l.* in respect of such loss and damage. The plaintiff claimed (*a*) 420*l.* damages and (*b*) 70*l.* damages.

The defence admitted the execution of the lease of June 14, 1888, and alleged that, after the execution of the deed of May 21, 1906, by a deed dated May 22, 1906, the plaintiff as beneficial owner granted and conveyed to the Prudential Assurance Company, Limited, the said lands and messuage mentioned in the statement of claim in fee simple by way of mortgage, subject to the lease of June 14, 1888, and the fee simple and the reversionary estate in such lands and messuage on the termination of such lease, and the right to sue on the covenants therein was and is in that company. The defendant submitted that the plaintiff was not entitled to maintain the action. The defendant did not admit the alleged breaches of covenant.

By the reply the plaintiff alleged that at all material times he was entitled to and in possession of the alleged mortgaged property, as to which the alleged mortgagees had given no notice of intention to take possession or to enter into receipt of such rents and profits, and that the plaintiff was and is entitled to maintain this action.

The allegation in the reply down to the words "rents and profits" was admitted by the defendant.

Bankes, K.C., and *C. C. Scott*, for the defendant. This action is a claim for damages for breach of a covenant to repair; the plaintiff at the date of the alleged breaches was the mortgagor in possession of the premises, subject to the lease, and the action can only be maintainable if it comes within the language of s. 25, sub-s. 5, of the Judicature Act, 1873. (1) The only words in the sub-section which can possibly be said to be applicable to an action of this kind are the words "may sue . . . . to . . . .

(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 5: "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

1909

TURNER v. WALSH.

recover damages in respect of any . . . . wrong relative" to the land, but the word "wrong" as there used refers to acts done by strangers, and not to a breach of covenant by a lessee: *Matthews* v. *Usher*. (1) The action is, therefore, not maintainable. [They also cited *Trent* v. *Hunt* (2) and *Molyneux* v. *Richard*. (3)]

[CHANNELL J. Is not the Conveyancing Act, 1881, in point?]

Rawlinson, K.C., and *Rose Innes*, for the plaintiff. It is contended that the plaintiff is entitled to sue by virtue of s. 25, sub-s. 5, of the Judicature Act, 1873. The plaintiff did not by his mortgage assign to the mortgagees the benefit of the covenants in the lease, and the mortgagees have no rights under the covenants unless and until they take possession. Until the mortgagees have taken possession the mortgagor has the right to enforce the covenants of the lease against the lessee. He would otherwise be in a position of great difficulty, because he is himself liable to the mortgagees on a covenant to repair in the mortgage. A mortgagor even before the Judicature Act had always full power to enforce his rights without making the mortgagee a party to the action. [They referred to *Van Gelder* v. *Sowerby Bridge, &c., Co.* (4)] There is no reason why the word "wrong" in s. 25, sub-s. 5, should be given the limited construction contended for by the defendant, and there is a passage at the end of the judgment of Bramwell L.J. in *Fairclough* v. *Marshall* (5) which shews that in his view "wrong" does not mean only a wrong independent of contract, but includes a breach of covenant to repair. Further, whatever may have have been the position during the currency of the lease, this action was not commenced until after its termination.

Bankes, K.C., in reply. Before the Judicature Act a mortgagor in possession of land subject to a lease had certain equitable rights, such as the right to obtain from the Court of Chancery an injunction to restrain the tenant from injuring the land, and certain limited legal rights, such as the right to receive the rents and to distrain as bailiff for the mortgagee. The language of s. 25, sub-s. 5, was intended to meet these two classes of

(1) [1900] 2 Q. B. 535.
(2) (1853) 9 Ex. 14.
(3) [1906] 1 Ch. 34.
(4) (1890) 44 Ch. D. 374.
(5) (1878) 4 Ex. D. 37.

cases: *Matthews* v. *Usher* (1), per Romer L.J. It is right that the mortgagor should have the power of preventing injury to the land, but there is no ground for saying that s. 25, sub-s. 5, gives him the right to recover damages for breach of covenant to repair, and thus to put money into his pocket which really belongs to the mortgagee. The passage in the judgment of Bramwell L.J. in *Fairclough* v. *Marshall* (2) was a mere dictum. The point in question here did not arise in that case.

CHANNELL J. In this case one starts with the fact that before the Judicature Act, 1873, an action for damages for breach of a covenant to repair, whether brought during the currency or after the termination of the lease, must have been brought by the person who was entitled to the reversion at the time the breaches of covenant were alleged to have been committed; and, consequently, if there had been a person entitled to sue on the covenants in a lease, and that person had assigned his interest, the rights under those covenants which ran with the land passed to the assignee, and the result was the same whether the assignment was by way of mortgage or was an absolute assignment. It is true that in equity the mortgagor was regarded as the equitable owner, and so far as equitable remedies were concerned he could obtain them in the Court of Chancery. For example, an injunction being an equitable remedy, a mortgagor was entitled to obtain from the Equity Courts an injunction in support of his equitable title. But the Courts of Equity would not entertain a suit for damages by a mortgagor in possession or by any one else, that being a legal remedy, and, therefore, if a mortgagor had desired to make a claim for damages he would have been obliged to bring his action in the Courts of common law. That difficulty as to the Court in which to sue was one of the matters which the Judicature Act was intended to remedy, and the question is what change, if any, the Act has made in this respect. One great change that was made was that thenceforth all Courts were to act on equitable titles. That is a recognition that a mortgagor has an ownership, but it does not give a mortgagor in possession any right of action which he

(1) [1900] 2 Q. B. at p. 539. (2) 4 Ex. D. 37.

1909

TURNER v. WALSH.

Channell J.

did not possess before the Act was passed; the general provisions of the enactment make no difference in that respect. The question really is whether an action by a mortgagor in possession for damages for breach of a covenant to repair comes within s. 25, sub-s. 5, of the Judicature Act, 1873. That section provides that "A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipts of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." This case does not come within that later exception, but those words may nevertheless be of importance as shewing that there may be certain cases in which the mortgagor in possession would have a right of action upon a lease or other contract. The words "may sue for such possession" in s. 25, sub-s. 5, clearly do not include every action by a mortgagor to recover possession, for it was held in *Matthews* v. *Usher* (1) that s. 25, sub-s. 5, does not give to a mortgagor in possession of land, subject to a lease, the right to re-enter for breach of the covenants in the lease; and that decision seems to me strongly to support the view put forward by the defendant in this case, for if the right of election to treat a breach of covenant as a ground of forfeiture passes to the mortgagee, I should think that a right of action for damages for a similar breach would pass to him also. It is true that it was decided in *Fairclough* v. *Marshall* (2) that a mortgagor in receipt of the rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property without joining the mortgagee, but the decision there turned on the fact of an injury to a right of property, and the case, therefore, depended on circumstances different from those which govern an action for money damages, which action is not, in my opinion, within the ordinary meaning of the language of

(1) [1900] 2 Q. B. 535. (2) 4 Ex. D. 37.

1909

TURNER v. WALSH.

Channell J.

s. 25, sub-s. 5. The word "wrong" is usually used in contradistinction to "contract." In *Fairclough* v. *Marshall* (1) Bramwell L.J. said: "If by that sub-section the mortgagor may sue for possession or rents and profits, or in respect of trespass or other wrong, meaning wrong independent of any contract or duty, it is possible that the mortgagor may sue for rents and profits, but not for breach of covenant to insure against fire or to repair. I do not think this can have been meant, and perhaps hereafter that consideration may induce the Court, when the question is properly raised, to put some other construction on the word 'wrong.'" That is all there is in the nature of an authority for saying that the word "wrong" in s. 25, sub-s. 5, includes breach of a covenant to repair, and in my opinion it would be a straining of language so to hold.

It is not accurate to say that the mortgagee has no interest in the action. Supposing the mortgagor brought the action and so conducted it that he recovered only very small damages, and had no other means of doing the repairs except the damages recovered, it seems to me that the mortgagee would be very largely interested. No doubt in the majority of cases the person chiefly interested is the mortgagor, but if the mortgagee refuses to bring the action, the mortgagor can use his name for that purpose on giving him an indemnity, or the mortgagor might bring the action in his own name and join the mortgagee as defendant, which according to modern procedure would make the proceedings perfectly regular, and in an action so framed the damages could be definitely assessed once and for all; whereas if in this action as at present constituted the plaintiff were to recover, say, 20*l.*, the mortgagee would be entitled to take further proceedings on the ground that the damages were inadequate.

For these reasons I am of opinion that the plaintiff cannot maintain this action in its present form.

Judgment for the defendant.

F. O. R.

The plaintiff appealed.

Romer, K.C., and *P. Rose Innes*, for the plaintiff. A mortgagor of land, the mortgagee of which has given no notice of his

(1) 4 Ex. D. 37, at p. 45.

C. A. 1909

TURNER v. WALSH.

intention to take possession, is entitled to sue the lessee under a lease granted before the mortgage for a breach of the covenant to repair. The contention of the defendant that the plaintiff is not entitled to recover because the legal reversion is vested in the mortgagee is not well founded. The case comes within the language of s. 25, sub-s. 5, of the Judicature Act, 1873, which gives a mortgagor entitled to possession or to receipt of the rents and profits of land the right to sue (inter alia) to recover "damages in respect of any trespass or other wrong relative to" the land. The word "wrong" is not a technical term, as "tort" might be; as there used, it includes a breach of contract sounding in damages; that construction is helped by the concluding words of sub-s. 5, which shew that the contemplated cause of action may arise under a lease or any other contract. [They cited *Fairclough* v. *Marshall.* (1)]

The plaintiff, however, mainly relies upon the effect of s. 10 of the Conveyancing and Law of Property Act, 1881 (2), which was not cited in the Court below. The effect of that section is to confer on persons who are equitably entitled to the income of a mortgaged property which is subject to a lease the right to sue in respect of the lease; in other words, it makes the covenants go with the rent. In *Municipal Permanent Investment Building Society* v. *Smith* (3) Fry L.J., in pointing out that under that section covenants by a lessee are to go with the reversion "notwithstanding severance of that reversionary estate," said that he knew no better instance of severance of a reversionary estate

(1) 4 Ex. D. 37.

(2) By s. 10 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) (which only applies to leases made after the commencement of that Act), "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

(3) (1888) 22 Q. B. D. 70, at p. 73.

than the case of mortgagor and mortgagee, and that those words were probably introduced to meet the very case of severance by creation of a mortgage. The defendant relies on the latter part of the section, which gives the benefit of the covenants of the lease to "the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased." That must mean that so long as the mortgagor is entitled to the income he is the person entitled to sue on the lessee's covenants. If this is not so, the mortgagor, who is himself liable on his own covenants to the mortgagee, would have no remedy if the mortgagee declined to sue the tenant. In any event the words "notwithstanding severance of that reversionary estate" do not govern the whole of s. 10, and the plaintiff is clearly entitled under the latter part of the section to maintain his action.

Bankes, *K.C.*, and *C. C. Scott*, for the defendant. As regards the argument founded upon s. 10 of the Conveyancing Act, 1881, that section deals with the case of the reversioner alone, and the position of the mortgagor is not included within its scope. The expression "entitled subject to the term" is apt to describe a reversioner, but not to describe a mortgagor. The latter is not "entitled to the income" within the meaning of the section; he merely receives the income by permission of the mortgagee, who alone is entitled to it. Sect. 10 was intended by the Legislature to be confined to the case of reversioners; the latter part of the section is consequential on the earlier part and does not operate to create a new class of rights. The earlier part of the section, which no doubt enacted the existing law, deals with the mortgagee's right to recover, and the later part does not create any fresh right in a fresh class of persons other than those dealt with in the earlier part. The section is one of a group of sections dealing with leases only; it has no application to mortgages or to the rights of mortgagors, which are dealt with in a group of sections beginning with s. 15. Sect. 14, sub-s. 3, defines a "lessor," and a mortgagor does not come within the meaning of that definition. [They also cited *Robbins* v. *Whyte*. (1) As to the effect of s. 25,

(1) [1906] 1 K. B. 125.

C. A. 1909

TURNER v. WALSH.

sub-s. 5, of the Judicature Act, 1873, they argued as in the Court below, and cited *Trent* v. *Hunt* (1); *Molyneux* v. *Richards* (2); *Copestake* v. *Hoper* (3); *Van Gelder* v. *Sowerby Bridge, &c., Co.* (4)]

Romer, K.C., in reply. The argument for the defendant gives no effect to the concluding part of s. 10 of the Act of 1881. If it were merely consequential on the earlier part, there would be no reason for the change of language from the person entitled to the reversionary estate to the person entitled to the income subject to the term. The definition in s. 14 of the term "lessor" is not exhaustive; the section only provides that the term shall include certain persons, and it is in substance a procedure section: besides, the definition is avowedly only for the purposes of that particular section, which relates only to forfeiture.

Cur. adv. vult.

May 21. The written judgment of the COURT (Lord Alverstone C.J., Fletcher Moulton and Farwell L.JJ.) was delivered by

FARWELL L.J. By indenture of lease dated June 14, 1888, the Prudential Assurance Company demised to the defendant a house at Cuddington for twenty-one years from September, 1888. The lease contained the usual covenants, including covenants to keep the house in good repair. On May 21, 1906, the Prudential Assurance Company conveyed the premises demised by the lease to the plaintiff in fee, and on May 22, 1906, the plaintiff conveyed the same premises in fee to the Prudential by way of mortgage to secure a sum of money still owing. The Prudential have not taken, and have given no notice of intention to take, possession of the mortgaged property. The plaintiff now sues the lessee for breach of covenant to repair, and the question is whether he can maintain such an action. It is plain that he could not have done so before the Judicature Acts; at law the covenants in the lease were incident to the reversion and passed with it by the mortgage: *Doe* d. *Marriott* v. *Edwards*. (5)

(1) 9 Ex. 14.
(2) [1906] 1 Ch. 34.
(3) [1908] 2 Ch. 10.
(4) 44 Ch. D. 374.
(5) (1834) 5 B. & Ad. 1065.

C. A. 1909

TURNER v. WALSH.

The case was argued in the Court below solely on s. 25, sub-s. 5, of the Judicature Act, 1873, and we agree with Channell J. that that sub-section has no application to the present case. It enables a mortgagor entitled to possession or receipt of rents and profits, whose mortgagee has neither taken possession nor given notice of any intention to take possession, to sue for possession or recovery of rents and profits, "or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person." But an action for breach of covenant is not an action in tort, but in contract, a difference that must certainly have been present to the mind of the Legislature in 1873; and we cannot read "trespass or other wrong relative thereto," that is, to the demised land, as including an action ex contractu for damages for breach of contract. A doubt as to the meaning of these words was suggested by Lord Bramwell in 1878 in *Fairclough* v. *Marshall* (1), and in 1881 the Conveyancing Act was passed, and on the construction of s. 10 of that Act the argument in this Court has mainly turned. That section, which was not brought to the attention of Channell J., runs thus: "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased. This section applies only to leases made after the commencement of this Act."

The section provides, in our opinion, for two distinct matters quite independent one of the other; it first annexes rent and the

(1) 4 Ex. D. 37, at p. 45.

C. A. 1909

TURNER v. WALSH.

benefit of covenants to the reversion, notwithstanding the severance of such reversion, and it then makes rent recoverable and covenants enforceable "by the person from time to time entitled, subject to the term, to the income of the whole or any part" of the demised land. The words "whole or any part" shew that the latter part of the section is independent of the former, for there can have been no severance when the whole of the land remains. Moreover, it would be absurd to give the right to sue and recover to different persons according as the reversion on the demised premises was severed or not, so that in cases where the reversion had been severed the persons named in this section could recover, but in cases where there had been no such severance they could not. If the two divisions of the section were transposed so that the section ran "Rent, &c., and the benefit of every covenant, &c., shall be capable of being recovered &c., by the person from time to time entitled, &c., and shall be annexed to the reversion notwithstanding severance," the case would be hardly arguable.

The question then becomes simply one of fact. Who is entitled to the income of the mortgaged property? Where land is both demised and mortgaged, the answer depends on whether the mortgagee has taken possession or given notice of his intention to take possession of the mortgaged property or not: if he has done so, then he is entitled; if he has not, the mortgagor was always and is still so entitled, and he receives and retains such income for his own benefit, without any liability to account either at law or in equity. As Lord Selborne says in *Heath* v. *Pugh* (1), "It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in possession: mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee." The 10th section makes no alteration in the rights of any one, but merely alters procedure, so as to give the right of action to the person entitled to the proceeds of such action. This is plain if the true nature and character of a mortgage is borne in mind; it is a mere security for the debt, and

(1) (1881) 6 Q. B. D. 345, at p. 359.

(subject to the paramount liability to this debt) the mortgagor retains an estate which can be granted and demised, and which descends to the heir. "It may be demised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery . . . . the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets": per Lord Hardwicke in *Casborne* v. *Scarfe* (1); or, as Cotton L.J. says in *Fairclough* v. *Marshall* (2), "We are here to recognize equities, and to deal with substance rather than form. It is not the mortgagees who are the owners, but the mortgagor. The mortgagor is the beneficial owner, subject to the incumbrance, and the plaintiff is in the position of a mortgagor having beneficial ownership of a rent issuing out of the land and certain other benefits."

This has been settled for many years, but practical difficulties arose in procedure when the mortgagee did not take possession: his safety was always paramount, and he could protect himself by taking possession; but while he remained satisfied with his security, and left the mortgagor in undisturbed possession, the latter was sometimes embarrassed in enforcing covenants in leases. If the mortgage preceded the leases, the tenants were estopped from disputing their lessors' title, and no difficulty arose; but if the leases preceded the mortgage, the mortgagor was driven to obtain leave to use the mortgagee's name in order to sue on the lessee's covenants; he could obtain the rent by distraining as the mortgagee's bailiff, but he could not sue on the covenants. It is probable that any difficulty in obtaining such leave seldom arose, because it was to the interest of the mortgagee as well as of the mortgagor that the lessee's covenants should be performed, and if the mortgagee were in possession, he would be liable for neglecting to enforce them. But the mortgagor was not without remedy; he could have obtained leave to use the mortgagee's name in suing on giving a proper indemnity, although, in consequence of the tenderness displayed to mortgagees by Courts of Equity, he would have had to file a bill to redeem in

(1) (1737) 1 Atk. 603, at p. 605.

(2) 4 Ex. D. 37, at p. 48.

C. A. 1909

TURNER v. WALSH.

order to obtain such leave. The mortgagee is not a trustee for the mortgagor except in a very special and modified sense, as was explained by Sir Thomas Plumer in *Cholmondeley* v. *Clinton*. (1) But in the absence of any special agreement, the damages, when recovered, undoubtedly belonged to the mortgagor, and although the mortgagee could of course sue on the covenant himself for his own benefit, if he pleased, he could not do so without rendering himself liable to account as mortgagee in possession of the demised property, a position that no mortgagee who was not desirous of calling in his mortgage would be willing to accept. It is plain, therefore, that a construction of s. 10 that obviates these technical difficulties interferes with no rights, but merely simplifies procedure. It is urged that s. 10 falls under Part III. of the Act, headed "Leases," and that "mortgages" form Part IV., and that mortgages would have been expressly mentioned in s. 10 if leases of land in mortgage had been intended. We are unable to follow this. The Act is not constructed in watertight compartments. The object of the Act was to amend the law of property generally, and mortgages and leases constantly overlap; there are probably few large estates in England all or parts of which have not been in mortgage for the last two centuries at least. The words in s. 10, "person entitled to the income," are perfectly general. "Income" by s. 2, sub-s. 3, includes "rents and profits," and it would be difficult to find a better definition of a mortgagor in possession than the person entitled to the rents and profits of the land, or to the income thereof, if the land is subject to a lease. It is certainly in accordance with the intention expressed in s. 25, sub-s. 11, of the Judicature Act, 1873, that this should be so; and it seems probable that when in 1878 it was suggested in *Fairclough* v. *Marshall* (2) that s. 25, sub-s. 5, had this defect, s. 10 of the Conveyancing Act, 1881, was framed designedly to cure it.

The section of the Conveyancing Act, 1881, that came in question in *Matthews* v. *Usher* (3) was s. 14; the lease in that case was dated long before the Act, and s. 10 had therefore no application.

(1) (1820) 2 Jac. & W. 1, at p. 182 et seq.

(2) 4 Ex. D. 37.

(3) [1900] 2 Q. B. 535.

We are therefore of opinion that this appeal should be allowed with costs.

C. A. 1909

TURNER v. WALSH.

Appeal allowed.

Solicitors for plaintiff: *Stilgoes.*
Solicitor for defendant: *W. Gamble.*

W. J B.

JOHNSON, APPELLANT *v.* WILSON, RESPONDENT.

1909

June 15.

Revenue—Dog Licence—Exemption — Dogs for tending Sheep and Cattle—Consent of Petty Sessional Court—Jurisdiction to inquire whether more than one Dog necessary—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict. c.* 15), *s.* 22, *sub-s.* 2—*Dogs Act*, 1906 (6 *Edw.* 7, *c.* 32), *s.* 5, *sub-s.* 1.

By s. 22, sub-s. 2, of the Customs and Inland Revenue Act, 1878, a farmer or shepherd may fill up and sign a declaration in the prescribed form stating the number of dogs kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd, and upon delivering the declaration so filled up and signed to the proper person he shall be entitled to receive a certificate of exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use as above mentioned. By s. 5, sub-s. 1, of the Dogs Act, 1906, the grant under s. 22 of the above Act of a certificate of exemption from duty in respect of a dog shall require the previous consent of a petty sessional court, but such consent shall not be withheld if the Court is of opinion that the conditions for exemption mentioned in the said section apply in the case of the applicant.

A farmer claimed exemption from duty in respect of two dogs which were kept by him solely for use in tending sheep and cattle, one being specially trained to tend sheep, and the other to tend cattle. The justices in petty sessions found that only one dog was necessary for the applicant, and refused their consent to the grant of a certificate of exemption for more than one dog:—

Held, that the justices had only jurisdiction under s. 5, sub-s. 1, of the Dogs Act, 1906, to inquire whether the conditions specified in s. 22 of the Act of 1878 applied, namely, whether the applicant was a farmer or shepherd, and whether the dogs in respect of which exemption was claimed were kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd, and as those conditions were fulfilled the justices had no power to refuse their consent to exemption for two dogs because they were of opinion that, in the circumstances, only one dog was necessary.

CASE stated by justices for the North Riding of Yorkshire.

At a petty sessions holden at Richmond in and for the Gilling

1909

JOHNSON v. WILSON.

West Division of the North Riding of Yorkshire on March 20, 1909, an objection by the respondent, a superintendent of police, to a claim by the appellant for a certificate of exemption from duty in respect of two dogs under s. 22 of the Customs and Inland Revenue Act, 1878 (1), and s. 5 of the Dogs Act, 1906 (2), was heard.

(1) 41 & 42 Vict. c. 15, s. 22: "In the case of dogs kept and used solely for the purpose of tending sheep or cattle on a farm, or in the exercise of the calling or occupation of a shepherd, exemption from duty may be obtained by the owners of such dogs in the following manner:—

"(1.) The Commissioners of Inland Revenue shall cause such forms of declaration to be prepared as may be required for carrying out the purposes of this section:

"(2.) The owner, whether a farmer or a shepherd, may fill up and sign a declaration in the prescribed form, wherein shall be stated the number of dogs kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd, and such further particulars as the said Commissioners may by the form of declaration require to be therein stated, and upon delivering the declaration so filled up and signed by him to the person named therein as the person to whom the same is to be delivered, he shall be entitled to receive a certificate of exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd, and such certificate shall be dated on the day on which the same shall be issued, and shall terminate on the 31st day of December following."

(2) 6 Edw. 7, c. 32, s. 5, sub-s. 1: "The grant of a certificate under s. 22 of the Customs and Inland Revenue Act, 1878, of exemption from duty in respect of a dog shall require the previous consent in England of a petty sessional court . . . . but such consent shall not be withheld if the Court is of opinion that the conditions for exemption mentioned in the said section apply in the case of the applicant, and the procedure for obtaining that consent shall be regulated in England by rules made by the Lord Chancellor. . . . ."

The Dogs Act Rules, 1906, with a schedule of forms, were made by the Lord Chancellor under the above section, the rules requiring an application for the consent of the Court to the grant of a certificate of exemption to be made by sending the declaration to the clerk of the justices at the petty sessional court house, and a notice of objection thereto to be also sent to the clerk.

By s. 6 of the Finance Act, 1908 (8 Edw. 7, c. 16), the collection of the duties on local taxation licences, including the duty on dog licences, was transferred to county councils and county borough councils; and by an Order in Council (Local Taxation Licences, England), dated October 19, 1908, the transfer took effect as from January 1, 1909, and by clause 13 of the Order the clerk to the justices to whom an application is made for a consent to the grant of a certificate of exemption

1909

JOHNSON v. WILSON.

The appellant sent a declaration claiming exemption from duty for two dogs to the clerk to the justices of the Gilling West Division, of which the following was a copy:—

"I, J. Johnson, residing at Hipswell Lodge Farm, in the parish of Hipswell, in the county of Yorkshire, hereby declare that two dogs, of which I am the owner, are kept by me at Hipswell Lodge Farm solely for use in tending sheep or cattle on land situate at ——.

"Signed by me this 30th day of January, 1909.

"John Johnson." (1)

The respondent signed an objection to the appellant having an exemption for more than one dog, of which the following, so far as material, was a copy:—

"I, Frederick Wilson, of Richmond, superintendent of police, object to the consent of the Court being given to the grant of a certificate of exemption from licence duty on the application made by John Johnson, of Hipswell Lodge, Hipswell, farmer.

"The grounds of my objection are as follows:

"That your application for two exemptions is excessive.

"I consider one dog sufficient for the number of stock on your farm.

"Dated the 10th March, 1909.

"(Signed) F. Wilson, superintendent."

On the hearing of the objection the following facts were proved:—

The appellant was a farmer and farmed 178 acres of land, 112 acres being grass and sixty-six acres being arable, and he owned about twenty breeding cattle and about twenty younger cattle and sixty to seventy breeding ewes at the time when the claim for the exemption was made. The appellant stated that he kept

---

from duty in respect of a dog shall, if the consent is granted, forward the declaration made by the applicant, with the consent thereon, to the clerk to the council of the county or county borough in which the applicant resides, and it shall be the duty of the council of that county or county borough to cause certificates of exemption to be issued and delivered.

(1) This declaration was in the form prepared by the Commissioners of Inland Revenue under s. 22 of the Customs and Inland Revenue Act, 1878.

1909

JOHNSON v. WILSON.

two dogs, one specially trained to tend sheep, and another specially trained to tend cattle; that a sheep dog was of no use for cattle and a cattle dog was of no use for sheep; that he had always kept two dogs; that his dogs were kept chained up except when tending cattle or sheep; and that his farm was a scattered one, and two dogs were necessary to carry on his farm.

The decision of the justices was as follows:—

"(1.) We having considered the above facts found that only one dog was necessary for the appellant, and allowed the objection, and gave consent for an exemption for one dog only.

"(2.) We, the justices for the above division, have laid down a general rule to grant in respect of enclosed farms (unless exceptional circumstances are proved) exemption for one dog when the applicant has more than seven head of stock and under 150, and for two dogs if he has over 150 head of stock.

"(3.) We do not grant exemptions to butchers, cattle salesmen, and drovers, or to dairymen using dogs merely for taking cattle to and from grazing lands."

The questions of law for the opinion of the Court were:—

(1.) Whether a petty sessional court in England was bound under the Customs and Inland Revenue Act, 1878, s. 22, sub-s. 2, and the Dogs Act, 1906, s. 5, sub-s. 1, to consent to two exemptions from dog duty to every applicant who being a farmer or shepherd kept two dogs solely for use in tending sheep or cattle on an enclosed farm.

(2.) Whether such petty sessional court had, under the circumstances detailed above, power to exercise their discretion in consenting to or refusing applications for one or two exemptions from dog duty under the Customs and Inland Revenue Act, 1878, s. 22, sub-s. 2.

Holman Gregory, for the appellant. Sect. 5, sub-s. 1, of the Dogs Act, 1906, requires the previous consent of a petty sessional court to the grant of a certificate of exemption under s. 22 of the Customs and Inland Revenue Act, 1878, from duty in respect of a dog, but such consent is not to be withheld if the conditions for exemption mentioned in s. 22 of that Act apply. Those conditions, as stated in sub-s. 2, are that the applicant is a farmer or shepherd,

and that the dog or dogs is or are kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd, and if the petty sessional court is of opinion that those conditions apply to the applicant, they have no jurisdiction to refuse their consent to the grant of a certificate of exemption in respect of the dog or dogs, not exceeding two, for which exemption is claimed. The object of the Act of 1906 was to give to a local Court, which presumably was better able to inquire into the matter than the Commissioners of Inland Revenue, the power to test the truth of the statements contained in the applicant's declaration, namely, that he is farmer or shepherd, and that the dogs are kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd. That jurisdiction of the petty sessional court remains unaffected by the transfer of the collection of the duties on dog licences to the county and county borough councils. The jurisdiction of the justices in the petty sessional court is limited to an inquiry into the above matters, and they have no jurisdiction to refuse their consent because they think that only one dog is necessary for the particular farmer or shepherd. If the applicant has made the required declaration and the justices are satisfied that the conditions above mentioned apply, they cannot refuse their consent. The Act has left it to the farmer or shepherd, so long as he acts bona fide, to fix the number of dogs, not exceeding two, in respect of which he claims exemption.

Further, the justices in refusing their consent to exemption in respect of more than one dog acted upon a general rule which they had laid down, and did not deal with the case upon its own merits. Upon that ground also their decision cannot be supported.

C. P. Scott, for the respondent. Under s. 5, sub-s. 1, of the Dogs Act, 1906, the justices in petty sessions have power to refuse their consent to exemption in respect of any dog which in their opinion is not kept by the applicant solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd. The justices have in the present case found in effect that only one dog is necessary for tending the applicant's sheep and cattle. A farmer or shepherd is not entitled to

1909

JOHNSON v. WILSON.

exemption in respect of two dogs if one is sufficient. The justices, by their finding that only one dog was necessary for the appellant, must have negatived the ground upon which the appellant based his application for exemption, namely, that he kept one dog specially trained to tend sheep and one dog specially trained to tend cattle, and that a sheep dog was of no use for cattle and a cattle dog of no use for sheep. The justices must have thought that the appellant did not keep the two dogs solely for tending sheep and cattle. It lay upon the appellant to substantiate his claim for exemption, and he has not done so. *Phillips* v. *Evans* (1), shews that the Commissioners of Inland Revenue, now the county or county borough councils, have a discretion to grant or withhold a certificate of exemption. The decision of the justices was therefore right.

Holman Gregory did not reply.

LORD ALVERSTONE C.J. In my opinion we must answer the questions asked in favour of the appellant. The matter seems to me to be reasonably clear. By s. 22 of the Customs and Inland Revenue Act, 1878, the owner of dogs, whether he is a farmer or a shepherd, may fill up and sign a declaration stating the number of dogs kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd, and such further particulars as the Commissioners of Inland Revenue may by the form of declaration require to be therein stated, and, upon delivering the declaration so filled up and signed to the proper person, he shall be entitled to receive a certificate of exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use in tending sheep or cattle, or in the exercise of the calling or occupation of a shepherd. Sect. 5, sub-s. 1, of the Dogs Act, 1906, has not altered the rights which s. 22 of the Act of 1878 has given to the farmer or shepherd, but it has imposed a safeguard upon the grant of a certificate of exemption, namely, the previous consent of a petty sessional court; but it is expressly added in favour of the farmer or shepherd that "such consent shall not be withheld if the Court is of opinion that the conditions for

(1) [1896] 1 Q. B. 305.

exemption mentioned in the said section apply in the case of the applicant." No question could have been raised before the Act of 1906 as to the number of dogs in respect of which the applicant would be entitled to claim exemption; he would have been entitled to claim exemption in respect of two dogs, provided that he was a farmer or shepherd, and that the dogs were kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd. The superintendent of police, who seems to be a proper person, under the Dogs Act Rules, 1906, to object to exemption being given, states as the grounds of his objection that "your application for two exemptions is excessive," and "I consider one dog sufficient for the number of stock on your farm." In my opinion both the superintendent of police, in making an objection upon those grounds, and the justices, in giving effect to the objection, went beyond their jurisdiction. I do not in any way base my judgment upon what the justices have called the general rule laid down by them. I do not stay to consider whether the rule as stated in the case is or is not a general rule. I express no opinion upon that question. I shall assume that the justices did not act upon any general rule, but decided this particular case upon its merits. Under s. 22, sub-s. 2, of the Customs and Inland Revenue Act, 1878, the justices can inquire whether the applicant for exemption is a farmer or a shepherd, and whether the dogs are kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd. The justices have asked us whether, assuming that these conditions for exemption are fulfilled, they are entitled to cut down the exemption to one dog, because the question which they have put to us is whether a petty sessional court is bound under s. 22 of the Act of 1878, and s. 5 of the Dogs Act, 1906, to consent to two exemptions from dog duty to every applicant who, being a farmer or shepherd, keeps two dogs solely for use in tending sheep or cattle on an enclosed farm. That question must, in my opinion, be answered in the appellant's favour. Subject to the justices being satisfied that the above-mentioned conditions for obtaining exemption are fulfilled, the applicant is entitled to exemption in

1909

JOHNSON v. WILSON.

respect of two dogs, and the justices are not entitled to cut down that exemption to one dog because they think that one dog is sufficient for the farm. The appeal must therefore be allowed.

JELF and A. T. LAWRENCE JJ. agreed.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell & Dods, for Wooler & Wooler, Darlington.*

Solicitors for respondent: *Thairlwall & Son, for W., B. & C. Hunton, Richmond, Yorks.*

W. F. B.

1909

June 16.

THE KING *v.* FULHAM GUARDIANS.

Lunacy—Lunatic who is not a Pauper—Order for Reception into Asylum—Classification as Private Patient—Application of Lunatic's Property to his Maintenance—Jurisdiction of Justice to order—"Chargeable to any Union or Local Authority"—Lunacy Act, 1890 (53 & 54 *Vict.* c. 5), *ss.* 13, 299; *Lunacy Act*, 1891 (54 & 55 *Vict.* c. 65), *s.* 3.

A person for whose reception and detention in a county lunatic asylum an order has been made under s. 13 of the Lunacy Act, 1890, is a person "chargeable to a union or local authority" within the meaning of s. 299 of that Act, and a justice has jurisdiction under the latter section to order any property of the lunatic to be seized and applied to the expenses of his maintenance, none the less because at the time of application for that order the lunatic has been "classified as a private patient" in accordance with the provisions of s. 3 of the Lunacy Act, 1891.

RULE for a mandamus to the guardians of Fulham to pay to the London County Council as the authority of the county lunatic asylum at Epsom a sum of money belonging to a patient inmate of the asylum.

On June 14, 1908, the relieving officer of the parish of Fulham, having knowledge that one Jane Hannah Davis, a single woman aged eighty-five, residing in the said parish, not being a pauper and not wandering at large, was deemed to be a lunatic and was not under proper care and control, removed her to the Fulham workhouse as preliminary to an application to a justice under

s. 13 of the Lunacy Act, 1890 (1), for an order for her reception into an asylum. At the time of her removal to the workhouse she was found to be in possession of bank notes to the amount of 135*l.* The relieving officer took possession of the notes and delivered them to the treasurer of the Fulham guardians. On June 17 a reception order was made by a justice under s. 13 for the reception and detention of Davis into the county of London asylum at Epsom, and on June 19 she was received into the asylum under that order. It having come to the knowledge of the asylums committee of the county council that the lunatic was possessed of the sum of 135*l.*, she was on June 29, 1908, classified as a private patient under s. 3 of the Lunacy Act, 1891 (2), and was placed in the private ward at a charge of 16*s.* 11*d.* per week, the rate of charge in the pauper ward being 10*s.* 6*d.* Thereupon the liability of the guardians for her maintenance ceased. The asylums committee then applied to the Fulham guardians to have the money of the lunatic handed over to them, but their application was refused. On July 28 they obtained an order of a justice under s. 299 of the Lunacy

(1) By s. 13, sub-s. 1, of the Lunacy Act, 1890, "Every constable, relieving officer, and overseer of a parish, who has knowledge that any person within the district or parish of the constable, relieving officer, or overseer, who is not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper care and control" is to give information to a justice. By sub-s. 2 the justice is to have the alleged lunatic medically examined; and by sub-s. 3, if he is satisfied that the alleged lunatic is a lunatic and is not under proper care and control, "the justice may by order direct the lunatic to be received and detained in any institution for lunatics to which, if a pauper, he might be sent under this Act."

By s. 299, sub-s. 1, "If it appears to any justice that a lunatic, chargeable to any union or local authority, has any real or personal property more than sufficient to maintain his family, if any, such justice may by order direct a relieving officer of the union, or the treasurer or some other officer of the local authority, to seize so much of any money, and seize and sell so much of any other personal property of the lunatic, and to receive so much of the rents of any land of the lunatic as the justice may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred or to be incurred in relation to the lunatic."

(2) By s. 3 of the Lunacy Act, 1891 (54 & 55 Vict. c. 65), "A lunatic sent to an institution for lunatics under section thirteen or sixteen of the principal Act shall be classified as a pauper, until it is ascertained that he is entitled to be classified as a private patient."

1909

REX v. FULHAM GUARDIANS.

Act, 1890, directed to the clerk of the county asylum at Epsom, ordering him to seize the 135*l.* then in the possession of the guardians and therewith to pay the sum of 2*l.* 4*s.* 5*d.* which had been expended by the county council in the maintenance of the lunatic in the interval between June 29, when she was moved into the private ward, and July 28, the date of the order, and also to pay thereout from time to time the sum of 16*s.* 11*d.* per week for her further maintenance. As a means of enforcing the said order the county council obtained a rule for a mandamus to the guardians to pay the 135*l.* to them.

Sydney Davey, for the Fulham guardians, shewed cause. The justice had no jurisdiction to make the order. Sect. 299 does not apply to private patients, but only to lunatics who are "chargeable to any union or local authority," that is to say, to pauper lunatics. The whole of Part X., which contains s. 299, refers to pauper lunatics alone. The subject of that part is, as the heading at its commencement states, the "Expenses of Pauper Lunatics." The words "chargeable to any union or local authority" refer to the definition of "pauper" in s. 341—"'Pauper' means a person wholly or partly chargeable to a union, county, or borough"—and are directly borrowed from that definition. The words "county or borough" have the same meaning as "local authority" in s. 299, that latter term being defined by s. 240 to mean "the council of every administrative county and county borough . . . . and the council of each of the boroughs specified in the Fourth Schedule" to the Act. Apart from the Act a pauper is only chargeable to a union, and when s. 299 speaks of a lunatic being chargeable to a local authority, that is to say to the council of a county or borough, it has reference to s. 290, under which, "If a pauper lunatic is not settled in the union from which he was sent to an institution for lunatics and his settlement cannot be ascertained," two justices may "inquire into the circumstances of the case and adjudge the pauper to be chargeable to the local authority, and may order the treasurer of the local authority to pay to the guardians of any union" the expenses of the lunatic's maintenance. Therefore a lunatic who under s. 299 is spoken of as

being chargeable to a union or to a local authority is in each case a pauper. The word "chargeable" is there used in its ordinary technical sense, that of liability to be maintained out of the rates of a particular area. If s. 299 is to be read as applying to persons who are not paupers, the justice might order a very large sum of money to be seized; but that could never have been intended. Where the lunatic is not a pauper the proper course is to take proceedings in lunacy for the appointment of a receiver. The section was only intended to apply to those trifling sums which a person might be possessed of consistently with his remaining a pauper.

But even if the section does apply to private patients the order is bad, for it does not shew that any inquiry has been made by the justice as to whether the whole 135*l.* will be wanted for the future expenses of the lunatic. He can only order the payment of such sum as he "may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred or to be incurred in relation to the lunatic." Here the woman was eighty-five years of age, and at the rate of 16*s.* 11*d.* per week it would take over three years to exhaust the whole sum. She might not live so long. The guardians are willing to pay the charges of the lunatic's maintenance from week to week, but they object to paying over the whole amount at once.

English Harrison, K.C., and *Ryde*, in support of the rule. Sect. 299 applies to private patients as well as to pauper lunatics. Where a lunatic has been classified as a private patient, inasmuch as he is, notwithstanding that classification, in fact maintained out of the funds of the asylum, he is "chargeable to the local authority" within the meaning of the section, though the authority may have a remedy over against his estate for the amount of their charges. The heading of a group of sections, such as "Expenses of Pauper Lunatics" at the commencement of Part X., may be looked at for the purpose of extending the words of a section, but not of limiting them. Moreover, that those words do not confine the operation of the whole part to pauper lunatics is clear from the fact that some of the sections in that part, such as s. 285, dealing with medical fees, apply in

1909

REX v. FULHAM GUARDIANS.

terms to lunatics who are not paupers. If in all cases in which lunatics had small sums of money in their possession the local authority had to make application to the Master in Lunacy for the appointment of a receiver, the whole sum might be exhausted in the application. It is absolutely necessary to have a summary procedure wherever the sum of money is small, and not merely in cases in which the lunatic is a pauper. With regard to the objection that the order is for too large a sum, it is a matter for the justice to determine how much is reasonably necessary. If the whole of the money is not expended the lunatic's next of kin will get it on her death.

LORD ALVERSTONE C.J. This was a rule granted to compel obedience to an order of July 28 of last year, made under s. 299 of the Lunacy Act, 1890, whereby a justice ordered the clerk of the county asylum at Epsom to take possession of a sum of 135*l.* which was in the hands of the Fulham guardians. The facts are not in dispute. Miss Davis was properly ordered to be sent to the county asylum. Previously to that order being made she had been found to have upon her bank notes to the amount of 135*l.*, and the guardians of the union had taken possession of that money. The London County Council, as the authority of the asylum, applied to the guardians that that money should be paid over to them, the lunatic having in the meantime been classified as a private patient upon the council becoming aware of her ownership of the money; and upon the guardians' refusal they obtained the justice's order which it is now sought to enforce. It was contended by Mr. Davey that s. 299 does not apply to private patients, but only to persons who are paupers at the date of the application for the order and who presumably always will remain paupers. The section provides that "If it appears to any justice that a lunatic, chargeable to any union or local authority, has any real or personal property more than sufficient to maintain his family" the order may be made; and it was contended that the words "chargeable to any union or local authority" indicated the scope of the section. It was said that they were borrowed from the definition of "pauper" in s. 341, by which

1909

REX v. FULHAM GUARDIANS.

Lord Alverstone C.J.

the word is defined to mean "a person wholly or partly chargeable to a union, county, or borough," and it was suggested that the words "local authority" in s. 299 and "county or borough" in s. 341 referred to the case provided for by s. 290, where the pauper's settlement cannot be ascertained, in which case he may be adjudged to be chargeable to the county council, or borough council as the case may be, within whose area the pauper shall have been found. But I do not think the word "chargeable" is to be understood in the earlier section in that limited and technical sense. I think that the benefit of the section was intended to be given to any local authority which was in fact maintaining the lunatic, whether that authority could or could not recover the cost of that maintenance from somebody else. When in the present case the lunatic was sent to the Epsom asylum somebody had to maintain her. If the Fulham guardians had to pay for her maintenance, she was chargeable to the union; if they had not, she was chargeable to the local authority, for she was in fact being maintained at the charge of the asylum authority. It is clear that if the application for the order had been made immediately upon her reception into the asylum the justice would have had jurisdiction to make it, and at that time she was in any view within the operation of the section, for by s. 3 of the Act of 1891 a lunatic who is sent to an asylum under s. 13 is in the first instance to be classified as a pauper. And it cannot be that the local authority are the less entitled to obtain an order for the payment to them of the lunatic's money because they have subsequently treated her as a private patient. But it was urged that this construction ought not to be put upon the word "chargeable" because s. 299 occurs in Part X. of the Act, which part commences with a heading "Expenses of Pauper Lunatics." But I have always understood that though you may look at a heading, as distinguished from a marginal note which is no part of the Act, you must not allow it to cut down the effect of plain words in the sections. Moreover, there appear to me to be more sections than one in Part X. which are not necessarily confined to paupers. No doubt that part applies mainly to paupers, but, I think, not exclusively. And having regard to the object and

1909

REX v. FULHAM GUARDIANS.

Lord Alverstone C.J.

purview of s. 299 and its plain language, with its own sub-heading of "Application of Lunatic's Property," I think the words of the heading at the commencement of the part are not sufficient to cut down that plain meaning. I think therefore that the county council had the right to apply for the payment over of this money. Then Mr. Davey raised another point as to the form of the order. He says that all that the justice could order was that the guardians should pay over so much of the money as he "may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred, or to be incurred, in relation to the lunatic," whereas he has ordered the whole 135*l.* to be paid at once. I do not think we ought to give effect to that objection. The weekly expense will rapidly rise up to a very large proportion of the sum. No doubt the order would have been less open to objection if it had stated that in the opinion of the justice the whole sum was only sufficient to pay the expenses of maintenance, but I do not think that the omission of that statement from the order is sufficient to justify us in refusing to enforce it.

JELF J. I have had considerable doubts as to whether s. 299 applies to any other lunatic than a pauper lunatic, and I cannot say that those doubts have been entirely removed, but I do not feel them sufficiently strongly to make me differ from the judgment which has been delivered by my Lord.

A. T. LAWRENCE J. I am of the same opinion. I think s. 299 is not confined to pauper lunatics. It applies to lunatics having property. There is no doubt that this money was properly applicable to the support of this woman, and the only question is whether it ought to be obtained by a summary order under s. 299, or whether the council ought to take expensive proceedings in lunacy for the purpose which would probably exhaust the greater part of the fund. It seems to me that there is nothing in s. 299 to prevent the money from being obtained in an inexpensive way, and when once the order has been made under that section, and the money paid over under it, the order would

afford as ample a protection to the guardians for so paying it as if an order had been made in lunacy. 1909

REX v. FULHAM GUARDIANS.

Rule absolute.

Solicitor for London County Council: *Edward Tanner.*
Solicitor for Fulham guardians: *T. Blanco White.*

J. F. C

PEGG & JONES, LIMITED *v.* DERBY CORPORATION.

1909

June 18.

Local Government—Privies—Undertaking by Local Authority to cleanse—Limited Undertaking—Neglect of Duty—Reasonable Excuse—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 42, 43.

By s. 42 of the Public Health Act, 1875, "Every local authority may . . . . themselves undertake . . . . the cleansing of . . . . privies . . . . either for the whole or any part of their district." And by s. 43 a local authority who, having so undertaken, fail "without reasonable excuse" to cleanse the privies of any house shall be liable to a penalty.

A local Act provided that all privies in a certain borough should be subject to the approval of the corporation. The corporation as the local authority of the borough undertook for the whole of their district the cleansing of all privies that had received their approval. The appellants, who occupied premises in the borough, laid an information against the corporation under s. 43 for neglecting to cleanse their privies. The privies in question had not been approved by the corporation:—

Held, (1.) that the words "any part of their district" in s. 42 referred to a particular area, and had no reference to a class of houses in the district, and that the limitation which the corporation attached to their undertaking was inoperative; (2.) that, the undertaking being treated as applying to all houses in the district, the non-approval of the privies by the corporation was not a "reasonable excuse" for their neglecting to cleanse them within the meaning of s. 43.

CASE stated by justices for the borough of Derby.

An information was laid by the appellants, Pegg & Jones, Limited, under s. 43 of the Public Health Act, 1875, against the respondents, the corporation of the borough of Derby, charging that the respondents, having undertaken the cleansing of privies in their district, did unlawfully and without reasonable excuse, after notice in writing requiring them to cleanse the

1909

PEGG & JONES, LIMITED v. DERBY CORPORATION.

privies at the appellants' premises, known as the Morledge Mills in the said borough, fail to cause them to be cleansed.

At the hearing the following facts were proved or admitted. The appellants were the occupiers of a factory known as the Morledge Mills. Belonging to the factory and used by the employees there were four privies or tub closets. These privies had not been approved by the respondents in accordance with a local Act which provided that the situation, dimension, materials, and construction of every water closet, privy, ashpit, and cesspool should be subject to the approval of the corporation. The respondents had themselves undertaken for the whole of their district the removal of house refuse from premises and the cleansing and emptying of all privies, ashpits, and cesspools which had received the approval of the corporation. On February 9, 1909, the appellants served a notice on the respondents requiring them to cleanse the privies at the Morledge Mills, but the respondents failed to comply with the notice.

No by-laws had been made by the respondents imposing any penalty upon the owners or occupiers of privies for failure to obtain the respondents' approval.

The justices were of opinion that the fact of the privies not having been approved by the respondents was a reasonable excuse within the meaning of s. 43 of the Public Health Act, 1875, and they accordingly dismissed the information.

Macmorran, K.C., and *Leach*, for the appellants. The case finds that the respondents have undertaken the cleansing of privies for the whole of their district with this limitation, that their undertaking does not extend to privies of which they have not approved. Under s. 42 of the Public Health Act, 1875 (1), under

(1) By s. 42 of the Public Health Act, 1875, "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . . the cleansing of earth closets privies ashpits and cesspools either for the whole or any part of their district."

Sect. 43: "If a local authority who have themselves undertaken or contracted for . . . . the cleansing of earth closets privies ashpits and cesspools fail without reasonable excuse after notice in writing" to cause them to be cleansed they are to be liable to a penalty.

Sect. 44: "Where the local authority do not themselves undertake or contract for . . . . the cleansing of

which they purported to act, they cannot lawfully give a limited undertaking of that kind. That section empowers them to undertake the duty for "any part of their district," but those words do not authorize them to undertake it for houses of a particular class while refusing to do so for another class. A "part" means a defined area. The limitation upon the respondents' undertaking must be rejected as invalid, and the undertaking regarded as applying to all privies in the district. Then, if so, they are liable to the penalty under s. 43. The fact of the appellants not having obtained their approval affords no "reasonable excuse" for their failure to discharge their duty.

Danckwerts, K.C., and *Etherington Smith*, for the respondents. There has in fact been no undertaking in writing by resolution of the corporation, but they have in practice always cleansed the privies of which they approved, which fact was well known in Derby. It was the appellants' duty not to use closets which were not approved, and they cannot by using improper closets impose upon the respondents a duty which they have in fact never undertaken. There is nothing ultra vires in limiting their undertaking in the manner found in the case. The houses in which the privies have been approved may be treated as "parts" of the district. In any case the illegal character of the privies in question is a reasonable excuse for the respondents' refusal to clean them. Such refusal may be fairly used as a means of compelling the appellants to discharge their own duty.

LORD ALVERSTONE C.J. The point raised in this case is not free from difficulty. The case finds that the respondents have themselves undertaken for the whole of their district the cleansing and emptying of all privies, ashpits, and cesspools which have received the approval of the corporation. I accept the statement made by the respondents' counsel that that means that the corporation in practice only cleanse those privies, ashpits, and cesspools which they have approved. There is apparently no undertaking in writing that they will do any

---

earth closets privies ashpits and cesspools belonging to any premises, they may make by-laws imposing the duty of such cleansing . . . . on the occupier of any such premises."

1909

PEGG & JONES, LIMITED v. DERBY CORPORATION.

Lord Alverstone C.J.

cleansing at all. But in practice they have cleansed throughout their district all the privies which have received their approval; and that fact is generally known in Derby. The question is whether the undertaking which is to be implied from that practice can be limited so as to exclude from it those privies of which they have not approved. That depends upon the language of s. 42 of the Public Health Act, 1875, by which "Every local authority may, and when required by the Local Government Board shall, themselves undertake or contract for . . . . the cleansing of earth closets privies ashpits and cesspools either for the whole or any part of their district." Speaking for myself, I think it is clear that those words "any part" do not entitle the local authority to pick out particular houses in the district and say "We will cleanse those and not the others." I think the section means that they may undertake the work for the whole district or for a particular limited area in that district, but not that they may limit their undertaking to particular houses. Still less can I assent to Mr. Danckwerts' suggestion that they may undertake to cleanse four of the privies in a particular house and leave uncleansed the fifth of which they do not approve. Then, assuming that the limitation of their undertaking to privies of which they have approved is to be rejected, and the implied undertaking is to be understood as extending to all privies in the district, what is to happen if they neglect the duty which they have undertaken? That is provided for by s. 43, by which, if the local authority having so undertaken fail without reasonable excuse, after notice in writing from the occupier, to cleanse any privy, they shall be liable to a penalty. Is it then a reasonable excuse for not cleansing a particular privy that it has not been approved? In other words, can they enforce submission to their requirements as to the construction of a privy by refusing to clean it out? I think not. The respondents have mistaken their remedy. They have, as an urban authority, power under s. 157 of the Public Health Act to make by-laws with respect to privies, and the proper method to compel the owner of a house to put his privies into the condition which they would approve is to exercise that power and then proceed against the owner for a breach of the

by-laws. In my opinion the case ought to go back to the justices to deal with upon the ground that it is not lawful for the local authority, when they have undertaken to cleanse the privies for the whole or a part of their district, to say "We will not cleanse those that are not properly constructed; instead of putting in force our other powers to compel their proper construction we decline to clean them out." The appeal must be allowed.

JELF J. I do not go so far as to differ from the judgment of my Lord, but I must say that I entertain very considerable doubts upon both points. It does not seem to me clear that particular houses in which the sanitary arrangements do not meet with the local authority's approval may not be said to be a part of their district, though I admit that from the point of view of convenience there are practical objections to that interpretation. With regard to the other point my doubt is still stronger. I should have thought that there was a great deal to be said for the contention that if in the authority's opinion particular privies were not properly constructed they might lawfully refuse to have anything to do with them and ask to have the improper construction treated as a reasonable excuse for that refusal.

A. T. LAWRENCE J. I am of opinion that the justices were wrong. In my opinion the Public Health Act contemplates three ways in which privies and cesspools may be cleaned out—by the local authority themselves, by a contractor, or by the occupier under by-laws made by the local authority for that purpose. In this case they have not made any such by-laws, nor have they employed a contractor to do the work. They have undertaken the performance of the duty themselves. And the question is whether in the discharge of that duty they can pick and choose, and cleanse some, while they leave others uncleansed merely because there is something in their construction of which they do not approve. I do not think they can do anything of the kind. Their remedy is to put in force their power of making by-laws, which will affect the offending occupier while saving the rest of the community harmless, and not to adopt

1909

PEGG & JONES, LIMITED v. DERBY CORPORATION.

the unreasonable method of bringing pressure to bear by leaving the privies uncleansed and thereby running the risk of causing a serious nuisance to health.

Appeal allowed.

Solicitors for appellants: *Eddowes & Sons, Derby.*

Solicitors for respondents: *Sharpe, Pritchard & Co., for Town Clerk, Derby.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1909

MARKS *v.* CARNE.

May 21, 22, 26.

Employer and Workman—Compensation—Principal, Liability of—"The Contractor"—Sub-contracting—"Workman"—Member of Employer's Family—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1, 2, 3; *s.* 13.

The respondent employed a contractor to execute certain work for him; the contractor employed his son, who was dwelling in the same house with him, to help in the work; the son met with an accident arising out of and in the course of his employment, for which he claimed compensation under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, from the respondent. It was admitted that, having regard to the definition of workman in s. 13, the son could not claim against the contractor:—

Held, that the respondent, "the principal," was not liable to pay compensation to a man who had no claim against the contractor, his true employer.

Construction of s. 4, sub-ss. 1, 2, and 3, considered.

APPEAL against the refusal of the judge of the county court of Wandsworth to award compensation to an applicant under the Workmen's Compensation Act, 1906.

The only question raised by this appeal which requires any notice in this report was as to the proper construction of s. 4 of the Workmen's Compensation Act, 1906, which deals with sub-contracting. The material facts were shortly as follows.

The respondent Carne was a timber merchant who in the course of his business had contracted to purchase and carry away some growing timber. He contracted with one Marks for the execution of part of the work, namely, the felling of the timber.

Marks employed his son Shem, who was dwelling in his house, to help him in the work. Shem Marks met with an accident arising out of and in the course of his employment, and he accordingly claimed compensation under s. 4 of the Workmen's Compensation Act, 1906, from the respondent, the timber merchant.

It was admitted that, having regard to the definition of "workman" in s. 13, which excludes "a member of the employer's family dwelling in his house," Shem Marks was not entitled to compensation under the Act from his father, who was his employer.

The county court judge held that Shem Marks' claim against the timber merchant could not be maintained.

Shem Marks appealed.

P. T. Blackwell and *Martin O'Connor*, for the appellant. Under s. 4, sub-s. 1, the appellant is entitled to recover against Carne; he is the "principal" as defined by the sub-section, and the words are "the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him." The Court must take it, therefore, that Shem Marks was for purposes of compensation immediately employed by Carne; therefore Carne was his employer, and Shem Marks was not a member of his family dwelling in his house and can sue him for compensation, and the fact that he cannot sue his father, who really employed him, is immaterial. "Principal" in s. 4, sub-s. 1, must be read as the "employer" of the workman.

Gutteridge and *S. E. Pocock*, for the respondent. Before any applicant can obtain compensation he must satisfy the judge that he is a "workman" as defined by s. 13 of the Act; the applicant in this case therefore does not satisfy the first condition precedent, as he is not a "workman," and there was no employment of a workman by the employer. It is admitted that the applicant cannot recover from his father, and sub-s. 2 of s. 4 gives the principal a right of indemnity by the contractor, and his liability is measured by the liability of the contractor. In this case the liability of the actual employer is nil. There was no

C. A. 1909

MARKS v. CARNE.

contract of service between the applicant and the principal. The words in s. 4, sub-s. 1, substituting principal for employer where proceedings are taken against the principal are inapplicable for the purpose of bringing the principal under liability in a case where the employer is not liable.

Blackwell, in reply.

Cur. adv. vult.

May 26. COZENS-HARDY M.R. This appeal raises a curious question as to the meaning and effect of s. 4 of the Workmen's Compensation Act, 1906. The respondent is a timber merchant who in the course of his business had contracted to purchase and carry away some growing timber. He contracted with Marks for the execution of part of the work, namely, the felling of the timber. Marks employed his son, the appellant, who was dwelling in his house, to help him in the work. The appellant met with an accident arising out of and in the course of his employment. But it is conceded that, having regard to the definition of "workman" in s. 13, he is not entitled to compensation under the Act from his father, who was his employer. He claims compensation under s. 4 from the timber merchant. The learned county court judge has held that his claim cannot be maintained. The language of s. 4 is by no means easy to understand, but upon the whole I think the section gives no right to a man who was not a "workman" within the definition clause. The section contemplates two persons, namely, the actual employer of the workman, called the contractor, and a hypothetical employer of the workman, called the principal. The principal is entitled to be indemnified by the contractor, and his liability is measured by the liability of the contractor. The words of s. 4, sub-s. 1, are "The amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed," and sub-s. 3 strongly confirms this view. I am not prepared to hold that the principal is liable to pay compensation to a man who has no claim against the contractor, his true employer. The words "as if that workman had been immediately employed by the principal" are not strong enough to outweigh the language

of the section as a whole. I think the decision of the county court judge was correct. The appeal must be dismissed with costs.

BUCKLEY L.J. For the purposes of s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906 (if the section applies), the respondent Carne is the principal, Marks, the father, is the contractor, and the applicant, Shem Marks, is the workman. Carne was a timber merchant. He bought some trees at Tooting from the owner of the land, and for the purposes of the purchase had to remove them. I do not intend to decide (for the question has not been argued) whether in these facts Carne was a person contracting with Marks for "work undertaken by the principal." Those words, I think, mean work undertaken by the principal not for himself, but for somebody else. The section has to do with the case of sub-contracting by a principal who is a contractor. I am not prepared to say that a purchaser who for the purpose of his purchase has to fell and remove trees is a person who has undertaken work for the owner of the land within the meaning of the section. For the purpose of this judgment I will assume that he is, but I expressly abstain from deciding it. The respondent is, I think, entitled to succeed upon the other point.

The man Shem Marks was by reason of the definition in s. 13 not a workman as between himself and his father. The question is whether he can recover compensation from Carne upon the footing that he was a workman as between himself and Carne. The learned county court judge is of opinion that he cannot. In my judgment he is right. The liability of the principal under s. 4 is a liability to pay to the "workman employed." From the context it is plain that those words refer to the employment of the workman in fact by his de facto employer as distinguished from the hypothetical employment of the workman by the principal which the section next mentions. There was in this case no employment of a workman by the employer, for the person, Shem Marks, who was employed was not a workman as between himself and his employer. Further, where the section goes on to enact that where compensation is

C. A. 1909

MARKS v. CARNE.

Buckley L.J.

claimed against the principal, then in the application of the Act references to the principal shall be substituted for references to the employer, there follows an exception, namely, that the amount of compensation is to be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed. This is necessarily the employment in fact. There was no employment here of the son as workman under his father, because by s. 13 the son was excluded from the meaning of the word "workman." The liability of the principal, therefore, if the appellant is right, is to be construed with reference to the earnings of a non-existent workman. The earnings of a non-existent workman are necessarily non-existent. That which the Act contemplates is that in a case where there is a liability in the contractor to the workman there shall (where the section is applicable) be a liability also in the principal to the workman, and sub-s. 2 provides that as between the principal and the contractor the former shall be indemnified by the latter. The Act nowhere contemplates a case in which the principal shall and the contractor shall not be liable. The words substituting principal for employer where proceedings are taken against the principal are inapplicable for the purpose of bringing the principal under liability in a case where the employer is not liable. For these reasons I think that the order under appeal is right and that the appeal should be dismissed with costs.

KENNEDY L.J. I do not think that this is a plain case. Neither of the conflicting interpretations of the combined effect of ss. 4 and 13 is to my mind entirely satisfactory. Of the two, perhaps, that which the learned county court judge has adopted appears to me to be the less unsatisfactory, and I therefore concur in the decision which has been already arrived at by the other members of this Court.

Appeal dismissed.

Solicitors: *Blackwell & Co.; Robert E. P. Norman.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 24, 25, 28.

McLEAN AND WIFE *v.* THE MOSS BAY IRON AND STEEL COMPANY, LIMITED.

Employer and Workman — Compensation — "Dependant" — "Member of a Family" — Stepfather — Illegitimate Child — Maintenance of Family by Workman — Workman's Earnings supplemented by Illegitimate Child's Wages — Claim of Mother — Partial Dependency — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13; *Sched. I.* (1.) (a) (ii.).

M. had married a woman with an illegitimate son of whom he was not the putative father: the three lived together, the son paying his wages to his mother, who put them into the common fund out of which the whole family was maintained. The son having met with a fatal accident, M. and his wife claimed compensation as "dependants."

Held, that M. was not the "stepfather" of the deceased and therefore not within the class of dependants mentioned in s. 13 of the Workmen's Compensation Act, 1906.

Held, also, by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), applying *Senior* v. *Fountains & Burnley, Ld.*, [1907] 2 K. B. 563, that, in the ordinary case of a husband and wife living together with other members of the family, the wife cannot claim as distinct from the husband to be dependent upon the earnings of a member of the family whose wages have gone to increase the common fund and have not been in any way appropriated to the benefit of the mother as distinct from her husband, and consequently that the mother also was not a dependant.

Held by Buckley L.J., that dependency was a question of fact in each case, and that on the facts of this case the mother was dependent on her son's earnings and entitled to compensation.

APPEAL against the award of the judge of the Whitehaven County Court upon a claim for compensation under the Workmen's Compensation Act, 1906.

In August, 1894, Robert McLean, the male applicant, married a woman with an illegitimate son, Isaac John Moore, of whom he was not the putative father: they all lived together, and Moore was treated as a member of the family, as if he were Robert McLean's son. In August, 1908, Moore met with a fatal accident while in the respondents' employ. At the time of his death Moore was earning 13*s.* a week as engine stoker. All three were at this time living together, and Moore was in the habit of paying all his wages to his mother, and these went into

C. A. 1909

McLEAN v. MOSS BAY IRON AND STEEL COMPANY, LIMITED.

a common fund out of which Moore and the whole family were maintained. McLean and his wife claimed compensation as dependants upon Moore, and were described in the request for arbitration as "stepfather and mother of the deceased."

The county court judge awarded 30*l.* as compensation in respect of Moore's earnings, which he apportioned as follows: 5*l.* to Robert McLean as "stepfather," and 25*l.* to the mother as partially dependent upon her son's earnings.

The employers appealed.

W. Ellis Hill (*Eldon Bankes, K.C.*, with him), for the appellants. As to the male applicant, he is not a dependant in law, for he is not the "stepfather" of the deceased and therefore not a member of his family within the definition of s. 13. An illegitimate bachelor can have no dependants other than "parent or grandparent." As a matter of fact, too, this applicant was not in any way dependent on the deceased. As to the mother, she was wholly dependent on her husband, and could not be partially dependent upon her son's wages also. The fact that the deceased contributed to the family fund makes no difference: *Senior* v. *Fountains & Burnley, Ld.* (1), the effect of which is that this family fund is considered to be the husband's fund out of which the whole family is maintained. So far, therefore, as the contributions by the deceased to the family fund are concerned, the present case is governed by the decision in *Senior* v. *Fountains & Burnley, Ld.* (1) No compensation is therefore payable to the mother as a dependant of this deceased son.

Silvain Mayer, for the respondents. The male applicant is a dependant within s. 13. "Step" is "a prefix used to indicate that the person spoken of is a connection only by the marriage of a parent": Century Dictionary. The illegitimate child is under the 1906 Act a member of the family in the same way and to the same extent as a legitimate child: *Schofield* v. *Orrell Colliery Co., Ld.* (2) The Act has made illegitimacy immaterial for the purposes of finding out who are dependants. As to the mother, she was, as a fact, clearly partially dependent on her son's earnings. Dependency is entirely a question of fact in

(1) [1907] 2 K. B. 563. (2) [1909] 1 K. B. 178, 181.

each case: *Main Colliery Co.* v. *Davies* (1); and a mother claiming as a dependant on her son killed in an accident may be an applicant for compensation, though the father be living at home with her as his wife: *Bevan* v. *Crawshay Brothers, Ld.* (2), and Annual County Courts Practice, p. 656. It does not follow that in every case when a child meets with a fatal accident some member of the family other than the father may not claim as a dependant. In the event of the Court holding that the male applicant is not a dependant, then the whole of the compensation awarded ought to be paid to the mother.

W. Ellis Hill replied on the question of the partial dependency of the mother.

Cur. adv. vult.

May 28. COZENS-HARDY M.R. The question in this appeal is whether compensation is payable by reason of the death through an admitted accident of a boy who was the illegitimate son of the female applicant. She is now the wife of the male applicant, who is not the putative father of the boy. The county court judge has found that the boy lived with the applicants and "paid all his wages into the common fund." The female applicant seems to have been the person to whom both the male applicant and the boy paid their wages, and from this one purse the family, including the boy, were maintained. There was a margin of profit, the boy's wages being in excess of the cost of maintenance. The learned county court judge has declared that the male applicant, whom he calls "the stepfather," and the mother are dependants, and has awarded 5*l.* to the "stepfather" and 25*l.* to the mother. The respondents contend that the award is bad as to the male applicant because he is not in law a dependant, and as to the mother because she was not in fact partially dependent. I am clearly of opinion that the male applicant is not within the class of "dependants" mentioned in s. 13. An illegitimate bachelor can have no dependant other than "parent or grandparent." And the attempt to make out that the male applicant is a "stepfather" seems to me preposterous. With regard to the mother there is more

(1) [1900] A. C. 358.
(2) (1901) 85 L. T. 496; and [1902] 1 K. B. 25.

C. A. 1909

McLEAN v. MOSS BAY IRON AND STEEL COMPANY, LIMITED.

Cozens-Hardy M.R.

difficulty. If the accident had happened to the male applicant, the mother would have been held to be wholly dependent upon his earnings, whether the family fund or the common fund was received by him directly or by her as his agent and family manager: *Senior* v. *Fountains & Burnley, Ld.* (1) And I do not think it possible to hold that she can be at once wholly dependent upon her husband's earnings and partially dependent upon her illegitimate son's earnings. If the husband and son had both been killed in the same accident, she could not have claimed against the employers separate compensations by reason of the deaths of the two. I doubt whether, in the ordinary case of a husband and wife living together with other members of the family, the wife can ever claim, as distinct from the husband, to be dependent upon the earnings of a member of the family whose wages have gone to increase the common fund and have not been in any way appropriated to the benefit of the mother as distinct from her husband. In my opinion the appeal must be allowed, and there must be a declaration that neither the male applicant nor the mother is entitled to compensation as a dependant of the deceased. The applicants, the respondents to the appeal, must pay the costs in the Court below and of this appeal.

BUCKLEY L.J. I cannot follow the learned county court judge in holding that the male respondent is a dependant. The question falls to be decided upon s. 13 of the Act of 1906. That section provides (using such of its words as are relevant to this particular case) that dependants means certain members of the illegitimate child's family, and by way of addition the parent of the illegitimate child who at the child's death was dependent upon the child's earnings. There were no members of the illegitimate child's family, for being illegitimate and a bachelor he could have none. It is therefore unnecessary to consider the next succeeding definition of the section, which includes a stepfather within the words "member of a family." Next, taking the words of addition, the male respondent was not a parent of the illegitimate child. It follows that he cannot be a dependant.

(1) [1907] 2 K. B. 563.

The question as to the female respondent is more difficult Dependency is irrespective of legal obligation to maintain. An infant is under no legal obligation to maintain his father, but his father may be his dependant. An illegitimate bachelor having no relations is not legally liable to maintain anybody (unless he is made liable under the Bastardy Acts), but his parent may be a dependant. The father of an illegitimate child is not legally liable to maintain him unless and until proceedings have been successfully taken against him under the Bastardy Acts, but the father is nevertheless, within the definition of the statute, a person of whom the child may be a dependant, or who may be dependent upon the illegitimate child. Dependency, therefore, is not dependent upon legal liability on the deceased to maintain. It is a question of fact: see *Main Colliery Co.* v. *Davies* (1) and *Bevan* v. *Crawshay Brothers, Ld.* (2) In the last-mentioned case the Court of Appeal refused to review the decision of the county court judge upon the question whether the mother was the dependant or not, solely upon the ground that the question was one of fact and that there was evidence upon which the county court judge could find as he did. The facts there were, that at the date of the child's death, the father and mother were living together and the child lived at home with them. In the case, therefore, of a child living with his father and mother and the rest of the family, and earning wages, the mother and not the father may be the dependant. It is impossible, I think, to maintain that the father is the only possible dependant within the Act of Parliament. *Senior* v. *Fountains & Burnley, Ld.* (3) decided that the widow and children of the workman in that case were none the less wholly dependent on the father's earnings because his earnings were supplemented by the earnings of his children. It is possible that in that case it would have been inconsistent to hold that if a child died the mother could be said to be partly dependent on the child. But it does not, I think, follow that in every case when a child dies some member of the family other than the father (say the mother or a sister) may not claim as a dependant. Suppose the facts were that the deceased child's

(1) [1900] A. C. 358. (2) 85 L. T. 496.
(3) [1907] 2 K. B. 563.

C. A. 1909

McLEAN v. MOSS BAY IRON AND STEEL COMPANY, LIMITED.

Buckley L.J.

earnings were devoted by him to paying for a sister's education, or suppose that the father from ill-health was not capable of earning anything at all, and that the father, mother, brothers, and sisters were in fact supported by the earnings of an eldest boy —not the father only, but the mother and brothers and sisters also —or even under certain circumstances the mother and the children to the father's exclusion might be the dependants. The question, I think, is in each case one of fact. In the present case the learned judge has found, it is true, that the deceased paid all his wages into the common fund. Common to whom? To the child's mother as well as to her husband. He has further found that the mother was a dependant. There was, I think, evidence to justify the findings. The man's evidence was that the child gave his wages to his mother, and that she gave him food, clothing, &c. The mother also says that the child gave his wages to her. The learned judge was not, I think, bound to find that the husband of the mother (had he been within the Act) was to the exclusion of the mother the child's dependant, and he has not found that in fact. It is plain that the mother is capable within the Act of Parliament of being found to be a dependant, and the judge has found her to be such. I see no reason for reviewing that decision. The question remains whether she is entitled to the 25*l.* or can claim the whole 30*l.* Upon this I refer to the form of the award. The judge has ordered the respondents to pay the sum of 30*l.* to the dependants. In so doing he was acting under r. 1 of the First Schedule to the Act of 1906, and ascertained what was the proper sum to be paid to the dependants, whoever they were. He then, under r. 8, finds the man and the mother to be dependants and apportions the ascertained sum of 30*l.* between them. In my judgment the man ought to be struck out from the class of dependants, with the result that the whole 30*l.* ought to be paid to the mother, but, as the majority of the Court are of a contrary opinion to my own, this will not be the order of the Court.

KENNEDY L.J. It is, I think, impossible reasonably to interpret the Workmen's Compensation Act as treating as a dependant, in the case of the death of a woman's illegitimate son, a man

who was not his father but has married the mother, and, with all respect to the learned county court judge, agreeing as I do with the judgments of the rest of this Court, I do not think it necessary to say more in my judgment upon this part of the appeal than that the appellant ought to succeed.

Upon the case as it affects the female dependant, I agree with the Master of the Rolls that where there is found, as in the present case, a husband supporting his wife by his earnings, there can be, under ordinary circumstances, no claim under this Act made by the wife on the ground of partial dependency in the case of the death of a child who has contributed to the "common fund." I think this was virtually decided by this Court in *Senior* v. *Fountains & Burnley, Ld.* (1) I do not see how it can be proper to hold, at one and the same time, that the wife is wholly dependent upon the husband's earnings and also partially dependent upon the earnings of her son. The Court of Appeal held in the case just cited, and I hold, for the purpose of deciding the present case, that in such circumstances as I have supposed (and they are the circumstances which are found in the present case) the sum contributed by a child of one or of both of the parents to the "common fund," whether paid to the head of the household directly, or into the hands of his wife as his agent, ought to be regarded as an accretion to the fund of the man who thereout maintains the household, and not as creating a partial dependency either of his wife or of his family upon the earnings of the child.

Of course the circumstances may be different. The husband of the mother of the contributing child may be from age or infirmity unable to earn money, so that in fact the wife and the family are not dependent upon his earnings, for the reason that they do not exist; or, one might imagine a case in which the child handed his money to the mother, or to a brother or sister living at home, solely for his or her own separate use, so that it could not form part of the "common fund," but serve, in respect to that contribution appropriated to the special purpose of one or more particular members of the family, to create a relation of dependency in the particular recipient or recipients. Or, again,

(1) [1907] 2 K. B. 563.

C. A. 1909

McLEAN v. MOSS BAY IRON AND STEEL COMPANY, LIMITED.

Kennedy L.J.

as in *Bevan* v. *Crawshay Brothers, Ld.* (1), the husband may desert his wife and disappear and leave her to become dependent wholly or in part upon the earnings of her child or children.

All these are peculiar cases to which the rule of inference laid down by this Court in *Senior* v. *Fountains & Burnley, Ld.* (2) does not apply. They are differentiated from that case by their facts. But here, so far as regards the claim of the deceased's mother to be treated as a dependant, the material facts are as they were in *Senior* v. *Fountains & Burnley, Ld.* (2), i.e., a husband supporting his wife by his earnings, and her child during his life contributing to the "common fund" of the household.

In my opinion this appeal ought wholly to succeed, and I concur in the judgment pronounced by the Master of the Rolls.

Appeal allowed.

Solicitors: *Watson, Sons & Room, for W. H. Chapman, Whitehaven; Helder, Roberts & Co., for Edward Atter, Whitehaven.*

(1) 85 L. T. 496. (2) [1907] 2 K. B. 563.

W. C. D.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 26.

CURTIS *v.* BLACK & CO.

Employer and Workman—Compensation—Seamen—Industrial Diseases—Certifying Surgeon—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 7, 8; *Sched. III.*

The applicant, whose home was at Liverpool, was employed by the respondents as a boatswain, and whilst painting the ship's hold at sea contracted lead poisoning. He was discharged in New York in April, 1908, subsequently returned to Liverpool, and in January, 1909, obtained a certificate from the certifying surgeon for the Liverpool district under the Factory and Workshop Act, 1901, that he was disabled by lead poisoning from following his usual employment :—

Held, that under s. 8, sub-s. 1, par. 1, of the Workmen's Compensation Act, 1906, before the applicant could make any claim for compensation in respect of an industrial disease he must get a certificate from the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which he was employed; and that, inasmuch as there was no district in which he was employed at the time when he contracted the disease, he could not successfully make a claim.

Appeal from an award of the judge of the county court of Liverpool upon a claim for compensation under the Workmen's Compensation Act, 1906.

T. J. Curtis, the applicant, whose home was in Liverpool, was in the employment of John Black & Co., shipowners, for several years as boatswain. In that capacity he had to assist in painting the ships' holds, and it was his duty to mix the paints, which necessitated the use of white and red lead. The last ship upon which he was employed by the respondents was the *Kelvin Head*. He joined that vessel in Manchester on August 28, 1907, and was discharged in New York in April, 1908. On the voyage he was employed mixing the paints, and he alleged that during the course of the work he became incapacitated for mixing and painting by reason of wrist drop. He returned to England from New York and was attended by a Dr. Higson for lead poisoning. On January 24, 1909, he saw Dr. Young, the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the Liverpool district, who gave him a certificate of suspension under s. 8, sub-s. 1, of the Workmen's Compensation

C. A. 1909

CURTIS v. BLACK & Co.

Act, 1906, suspending him from his usual employment on account of his having contracted lead poisoning. Between the date of his return to England and his visit to Dr. Young the applicant had followed no employment.

In February, 1909, Curtis took proceedings to recover compensation from the respondents. The learned county court judge found as a fact that the applicant was suffering from lead poisoning and was disabled thereby from following his usual employment, and that this was due to the nature of his employment by the respondents within the twelve months preceding the date of his visit to Dr. Young. But he held that the case did not come within the Workmen's Compensation Act, 1906, inasmuch as the applicant when he contracted the disease was not employed in any district to which a certifying surgeon had been appointed within s. 8, sub-s. 1, par. 1, of the Act, and there were no rules or regulations made under the Factory and Workshop Act, 1901, applicable to his employment within s. 8, sub-s. 1, par. 2, of the Workmen's Compensation Act, 1906.

The applicant appealed.

W. J. Lias, for the applicant. Sect. 8 of the Workmen's Compensation Act, 1906, which deals with industrial diseases, applies to the case of a seaman who contracts a disease at sea. The facts found by the learned county court judge bring this case within the Act. Sect. 7, which gives seamen the benefit of the Act, does not limit their rights in any way. Sect. 8 does not deprive them of the benefit of the Act merely because there is no surgeon within the Factory Acts of the district in which the workman was employed. By pars. 1 and 2 of sub-s. 1 of s. 8 the certificate of such a surgeon is made necessary in cases of illness, but par. 3 does not make it necessary in case of death. Therefore a certificate is not required in every case. The applicant comes within par. 1, and the expression "certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed" must be read in a popular sense. The learned judge has attached too great importance to the words "for the district in which a workman is employed."

[KENNEDY L.J. The Factory and Workshop Acts do not apply to seamen on the high seas.]

There are no special rules or regulations made under the Factory and Workshop Act, 1901, on this point, so it is not contended that Curtis is within par. 2. An English ship is considered to be still part of England when she is at sea, although she may not be in a particular district. A child born at sea can be registered in England. In the case of a seaman the "district" must be the district where he resides. If a man travelling in charge of a horse caught glanders the surgeon under clause 1 would be the surgeon of the place where he resided, and the applicant has obtained the certificate of the surgeon for the district in which he resides. If a man who lived in Northumberland went to Cornwall and was taken ill there he would, if he returned to his home, be certified by the surgeon for Northumberland. Proviso (*e*) to s. 8, sub-s. 1, shews that that is right.

If the learned county court judge is right all travellers must be excluded. "Employed" cannot mean "actually working," for in that case any one who was incapacitated would be excluded. Proviso (*f*) to sub-s. 1 of s. 8 shews that a certificate by a surgeon who is not the certifying surgeon may be accepted.

A. Hyslop Maxwell, for the respondents, was not called upon to argue.

COZENS-HARDY M.R. I think the award of the learned county court judge in this case is perfectly right. Whether there has been an omission from the Act or not I do not know. It may or may not have been the intention that a sailor who contracts at sea an industrial disease, as it is called, should be entitled to the benefit of s. 8 of the Workmen's Compensation Act, 1906, but, whatever may have been the intention of the Legislature, it is to my mind plain that the section as it stands asserts that before a workman who is suffering from an industrial disease, such as lead poisoning in this case, can make any claim he has to get a certificate from the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which he is employed that he is suffering from a disease mentioned in the Third Schedule to the Act. There is in this

C. A. 1909

CURTIS v. BLACK & CO.

case no surgeon of the district in which the applicant was working, so he cannot get such a certificate. It is impossible, it seems to me, to read the section without seeing that it gives no remedy to a workman who has contracted lead poisoning while at sea. The appeal must be dismissed with costs.

BUCKLEY L.J. Sect. 7 of the Workmen's Compensation Act, 1906, brings seamen within the benefits given by the Act. The question is whether s. 8 applies to seamen when at sea. That section provides for the application of the Act to industrial diseases. Sub-s. (1) states under three heads the conditions under which a workman who contracts such a disease in the course of his employment may be entitled to compensation. The first two paragraphs provide for the case where the workman is still alive, and the third for the case where he is dead. Paragraphs (i.) and (ii.) are in such form as that they are not capable of being applied to a workman who contracts an industrial disease at sea. The machinery of those paragraphs does not apply. The man is not in such a case employed in any district for which a certifying surgeon has been appointed under the Factory and Workshop Act, 1901, and he is not a person who, in pursuance of any special rules made under that Act, can be suspended from his usual employment on account of having contracted such a disease. It may be that par. (iii.), which is confined to cases in which death has taken place, must fall within the same category, but it does not apply to this applicant, for he is still alive. It is not necessary, therefore, to decide that in the present case. There is nothing in s. 8 to enable us to apply the Act to this case. Under the circumstances I think that the decision of the learned county court judge was right, and the appeal must be dismissed.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitors: *Gibson & Weldon, for Quilliam & Son, Liverpool; Botterell & Roche, for Weightman, Pedder & Co., Liverpool.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 26.

YSTRADOWEN COLLIERY COMPANY, LIMITED *v.* GRIFFITHS.

Employer and Workman—Compensation—Incapacity resulting from Injury—Disease—Natural Result—Injury by Accident—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1; *Sched. I., par.* 1 (*b*).

Where a workman receives personal injury from an accident arising out of and in the course of his employment and disease ensues which incapacitates him for work, the incapacity may be the result of the injury within the meaning of Sched. I., par. 1 (*b*), of the Workmen's Compensation Act, 1906, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury.

Appeal from an award of the county court judge of Neath and Aberavon.

David Griffiths was a roadman employed by the Ystradowen Colliery Company, Limited, and on December 6, 1907, whilst following his employment at the colliery, a large stone fell on his right thigh and injured him severely. He fainted and was then helped by two men for some distance towards his home, and had to walk the last mile by himself. It was a cold evening. His leg became worse, and he took about two hours to do the distance and caught a bad cold and chill. The doctor found him suffering from cold and shock and sent him to bed. Pneumonia supervened, followed by bronchitis, and, although he had never previously suffered from any trouble of the kind, the medical evidence was to the effect that he was now subject to bronchitis and chronic asthma and was permanently incapacitated for work.

On January 10, 1908, an agreement was come to whereby the company were to pay 14*s.* 10*d.* per week to Griffiths as compensation; and a memorandum to that effect was recorded on August 12, 1908.

On October 22, 1908, the company gave notice of an application to review and terminate or diminish the weekly payment of 14*s.* 10*d.* on the ground that Griffiths had recovered or partially

C. A. 1909

YSTRADOWEN COLLIERY COMPANY, LIMITED v. GRIFFITHS.

recovered from the effects of the accident. On March 19, 1909, the matter came before the learned county court judge, and he held that the condition of Griffiths was not the natural result of the injury, and that the company were therefore not liable to pay the full compensation, and he reduced it to one penny per month.

Griffiths appealed on the grounds that the learned judge misdirected himself in holding that the company were not liable to pay full compensation because the appellant's condition was not the natural result of the injury; that he was wrong in law in holding that any reasons were shewn empowering him to reduce the compensation; and that there was no evidence of the appellant's recovery.

Atkin, K.C., and *Meager*, for the appellant. The question is not whether the appellant's illness is the natural result of the injury, but whether it is in fact the result of the injury: *Dunham* v. *Clare*. (1)

[BUCKLEY L.J. referred to *Isitt* v. *Railway Passengers' Assurance Co.* (2) and *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* (3)]

The decisions in those cases turned upon the particular words of the policies, but the principle is the same. The question is whether the disease is directly caused by the accident, and it is settled that it may be so caused even though something else, in the shape of the introduction of a germ of disease into the man's system, intervenes after the accident: *Brintons, Ld.* v. *Turvey*. (4)

[KENNEDY L.J. This man's vitality was lowered by exposure, not by the accident. The cause of the illness was therefore something new, not the accident itself.]

His vitality was reduced by the shock caused by the accident, and it was directly owing to that that the dormant germ revived or the new germ entered his system.

W. Llewellyn Williams, for the company. The judgments in *Dunham* v. *Clare* (1) referred only to the particular facts of that

(1) [1902] 2 K. B. 292.
(2) (1889) 22 Q. B. D. 504.
(3) [1909] 1 K. B. 591.
(4) [1905] A. C. 230.

case and did not lay down any general principle. The disease arose in a wound which had been actually caused by the accident. Collins M.R. guards himself by saying (1) "If no new cause, no novus actus, intervenes, death has in fact resulted from the injury." What the learned county court judge had in his mind in the present case was the question whether there had been any new cause. That was the right question, and there has been no misdirection. There was evidence that some time after the accident Griffiths caught a fresh cold.

[COZENS-HARDY M.R. Acceleration of a disease has been held to come within the Act.]

That was decided in *Golder* v. *Caledonian Ry. Co.* (2), but there was no new cause in that case.

No reply was called for.

COZENS-HARDY M.R. This appeal raises, not for the first time, a question of some importance as to the meaning of the words used in the Act, "incapacity which results from the injury." In the first place it is quite clear that the mere contracting of a disease, apart from those particular diseases mentioned in the Act of 1906, is not, as a general rule, an accident at all; but, given an admitted accident, it is not the law to say that a disease which has been accelerated, still more if produced, by the accident, is not a matter which comes within the four corners of the Act of Parliament. This Court in the case of *Dunham* v. *Clare* (3), which certainly was not decided upon the facts of that case, but was decided on grounds of principle, laid down in most emphatic language that the test is not whether the death (it was death in that case, but in this it is partial injury) must be the natural result, or the probable result, of the accident; it may even be what Collins M.R. called the "unnatural" consequence of the accident. Certainly it is no answer to say it was not the natural result of the accident or not the probable result of the accident. If I may venture to read a few sentences from my own judgment in that case it will save me from repeating in longer language what I should desire to repeat here (4): "In my

(1) [1902] 2 K. B. 292, at p. 296.
(2) (1902) 40 Sc. L. R. 89.
(3) [1902] 2 K. B. 292.
(4) Ibid. at p. 297.

C. A. 1909

YSTRADOWEN COLLIERY COMPANY, LIMITED v. GRIFFITHS.

Cozens-Hardy M.R.

opinion the county court judge misdirected himself. A doctor who saw the wound on the day of the accident might have come to the conclusion that erysipelas was most unlikely to supervene, but the same doctor might subsequently have said that he was satisfied that death was the result of the injury. The question is, From what in fact has death resulted? The answer to that question does not depend upon what was at first thought to be reasonable and probable"—to which I will now add "natural." I also think that in considering questions of this kind it is quite legitimate and proper to consider whether an accident has not accelerated an existing tendency to disease in the body, or, as some people have said, has given life to certain latent causes of mischief in the body. The case mentioned to us of *Golder* v. *Caledonian Ry. Co.* (1) is a strong instance in point, and a case on tuberculosis which came before us about three years ago and is not reported, was another instance.

What has the learned judge done here? There was admittedly an accident—a stone fell upon the man. Liability for the accident was not disputed, and full wages were paid for a certain time. The man is now admittedly unable to work, and he is unable to work by reason, I think it is called, among many other phrases, of chronic bronchitis, and there is evidence which is worthy of attention—I say no more than that, because it is not a question for me to deal with—that this was brought about by reason of the weakened condition of the man, the state of debilitation which was immediately caused by the accident, which so affected him that he was some two hours in getting from the colliery to his own house on that night; and in these circumstances he contracted a cold which, in his debilitated condition, has led to this consequence. It is not for me to say what view the learned judge may take when the case goes to him for rehearing and judgment, but I think we are bound to give him this direction, that the test is not whether the present condition of the man is the natural result of the injury, but he must consider the result in fact. It may be an improbable result—I will even go so far as to say, as Collins M.R. said, possibly even an unnatural result—but the question is

(1) 40 Sc L. R. 89.

whether the man's present condition is the result of the accident in this sense, that it is occasioned by his debilitated condition immediately after the accident and occasioned by the accident which he has met with.

In these circumstances I think the case must go back to the learned judge to be tried after directing himself properly. All that we can do here is to allow the appellant the costs of this appeal. The costs of the first trial and of the second will be dealt with by the learned judge.

BUCKLEY L.J. To the language of s. 1 of the Act of 1906, which speaks of "injury by accident" caused to a workman, is to be added the language of the First Schedule, which speaks of incapacity which "results from the injury." The word "results" there, of course, does not mean "succeeds in point of time." It means "succeeds as a consequence of the injury," and not, I think, as either the necessary, or the natural, or the probable consequence of the injury, but as the consequence in fact. Further it need not, I think, be the consequence of the injury alone. It may be the consequence of the injury and of something else, at any rate where that something else would not have existed but for the accident. I may illustrate what I mean from *Dunham* v. *Clare*. (1) The medical evidence there was that erysipelas sets in about six days after the introduction of the germ which leads to the disease. Erysipelas had set in fifteen days after the day of the accident, so that in a sense it could not have resulted from the accident alone. The suggestion of the medical evidence was that the wound had probably been reopened, this being possibly caused by the deceased walking to and from the hospital. There was there, therefore, a disease produced, not by the accident alone, but by something else which would not have existed but for the accident—there was a wound in the man's foot which probably he reopened by walking to and from the hospital, wearing possibly a dirty stocking.

Here the facts with which we have to deal are these. The man sustained a severe injury to his knee by accident, and thereby his vitality and his powers of locomotion were reduced,

(1) [1902] 2 K. B. 292.

C. A. 1909

YSTRADOWEN COLLIERY COMPANY, LIMITED v. GRIFFITHS.

Buckley L.J.

He had to go home. He was taken part of the way home by some workmen; he had to go about another mile alone, and he travelled that mile with great difficulty, and, I suppose, in great pain. He took something like a couple of hours to cover that mile, crawling along as best he could. He caught a very bad cold. That cold may have resulted not merely from his exposure to weather, but from his being so exposed when his vitality was diminished by the shock of the accident, and by his being exposed for a longer time by reason of his reduced state of muscular activity. The cold may have resulted from the accident and from something else which would not have existed but for the accident, that is to say, from his having to walk with excessive slowness in cold weather. All that, I think, is included in the words "results from the injury." All that the learned county court judge did here was to come to the conclusion that the condition was not the natural result of the injury. I do not think he put the proper question to himself when he put that question. The question is not whether it is the natural result of the injury, but whether it is a consequence of the injury, resulting in such a way as I have explained. I think the matter ought to go back to the county court judge for his direction.

KENNEDY L.J. I am of the same opinion. I have as to the law nothing to add, and I prefer not to deal with the facts, as the matter has to be tried again.

Appeal allowed.

Solicitors: *J. T. Lewis, for Randell, Saunders & Randell, Llanelly; Smiles & Co., for Gee & Edwards, Swansea.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
June 9.

GANE *v.* NORTON HILL COLLIERY COMPANY.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Duration of Employment — Accident on Employers' Premises while Workman is leaving by usual and permitted Route—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A collier left his work, after coming up from the pit, by a route which crossed on the level some lines of rail belonging to and under the control of his employers. At the time the workman tried to cross there were some trucks standing on the line, and he tried to get under them; as he was doing so the trucks moved, and he was seriously injured. The county court judge found on the facts that there were three ways by which the workman might have gone home, but the way he went by was the shortest, was always used by all the workmen who lived in the same direction as the applicant, and was so used with the knowledge and consent of the employers:—

Held, that the accident arose out of and in the course of the applicant's employment within the meaning of the Workmen's Compensation Act, 1906, s. 1.

This was an appeal by the applicant from an award of the county court judge of Somersetshire (Temple Cloud and Midsomer Norton) in an arbitration under the Workmen's Compensation Act, 1906.

The applicant was aged nineteen and had at the time of the accident been working eighteen months for the defendants, a colliery company. His work was in the pit underground, and he had no work on the surface. On November 10, 1908, he was working in the pit, and, owing to some accident to the machinery, the men were sent up out of the pit earlier than usual, the applicant coming up at 11 A.M. instead of about 3 P.M. His work for the day was finished, and he and others went home. There were three ways by which he might have gone home—(1.) by a bridge across some lines of rail leading from the tips of the colliery to the main line of the railway; (2.) along the high road to the village; (3.) down some steps to the rails crossed by the bridge and across the rails on the level. No. 2 was for persons living in the same direction as the applicant much longer than

C. A. 1909

GANE v. NORTON HILL COLLIERY COMPANY.

the others. No. 3 was shorter than the others, and the applicant with other workmen took it. On the day of the accident there were trucks standing on the rails when the men reached the place where they usually crossed, and the men crossed by getting under the buffers of the trucks. Two men immediately in front of the applicant got safely across, but as the applicant was getting under the trucks they moved, and two wheels passed over his legs, crushing them so that both had to be amputated. The rails and trucks were under the control of the defendant company.

The county court judge found as facts on the evidence that engines and trucks were placed on the rails, and the trucks would reach as far as the screens, which were at the top of the steps, and were moved as required; that the way No. 3 was the usual way for the applicant and all other workmen who lived in the same direction to go, indeed was the only way by which they ever did go, except on Saturdays, when they had to go for their wages to the office, from which point their nearest way was across the bridge; that they went by the way across the rails with the knowledge of the respondent company, and the company never suggested that the men should not go that way; and that in fact no directions were given to the men as to which way they should go.

The steps had been constructed for the use of men engaged in screening the coal at the screens and not to make a way across the line.

The whole question was whether the accident arose out of and in the course of the applicant's employment. The county court judge held that it did not, and the applicant appealed.

C. A. Russell, K.C., and *Shakespeare*, for the appellant. The accident happened in the course of and arose out of the applicant's employment. *Sharp* v. *Johnson & Co.* (1) clearly shews that a man's employment does not begin and end with his actual work. The case of *Cross, Tetley & Co.* v. *Catterall* (2) in the House of Lords, quoted in the judgment of Collins M.R. in that case, shews that it may begin before the actual work. *Cremins* v.

(1) [1905] 2 K. B. 139, 145. (2) Not reported.

Guest, Keen & Nettlefolds (1) and *Lowry* v. *Sheffield Coal Co.* (2) are strong instances of its continuance after the work has ceased. It is part of the implied contract that the workman will, as soon as his work is done, leave the employer's premises without loitering by a way which is authorized by the employer, and so long as he is doing that his employment continues. The question whether the accident arose out of and in course of the employment depends on the inference which follows in law from the facts. The county court judge's findings of fact are not disputed, but he has drawn a wrong inference in law, and from that inference this appeal is brought.

Simon, K.C., and *T. W. H. Inskip*, for the respondents. The question whether the accident was in the course of and arising out of the employment is really one of fact, as stated by Collins M.R. in *Sharp* v. *Johnson & Co.* (3) There the appeal was entertained because the county court judge had misdirected himself. Here there was no misdirection. The county court judge stated the question quite correctly as "whether the accident happened in the course of and arising out of his employment." That is a question of fact, and the county court judge's decision cannot be upset, unless the Court holds, as a matter of law, that the workman is within the protection of the Act so long as his feet are on his employer's premises. In *Benson* v. *Lancashire and Yorkshire Ry. Co.* (4) the county court judge held that as a question of law that was so, but the Court of Appeal overruled him. The case of *Sharp* v. *Johnson & Co.* (5) only decided that there was no conclusion of law against the workman in the opposite sense. The cases shew that decisions like *Holness* v. *Mackay & Davis* (6) and *Davies* v. *Rhymney Iron Co.* (7) no longer cover the ground. The Act may apply after the actual work has ceased, but the workman must be doing something which is a necessary part of his employment. In *Holmes* v. *Great Northern Ry. Co.* (8) it was part of the contract between the employer and workman that the workman

(1) [1908] 1 K. B. 469.
(2) (1907) 24 Times L. R. 142.
(3) [1905] 2 K. B. 139, 144.
(4) [1904] 1 K. B. 242.
(5) [1905] 2 K. B. 139, 145.
(6) [1899] 2 Q. B. 319.
(7) (1900) 16 Times L. R. 329.
(8) [1900] 2 Q. B. 409.

C. A. 1909

GANE v. NORTON HILL COLLIERY COMPANY.

should travel by the train provided by the employer. In *Smith* v. *South Normanton Colliery Co.* (1) it was held that the workman was not protected, because there was no reasonable necessity for the workman being where he was. That is the case here. The applicant need not have gone across the line at all, for there were other ways. If it was the usual way, it was not necessary for him to use it when there were trucks on the line. It is impossible to contend that because a workman is allowed or not forbidden to use a particular way he is entitled to try to use it whatever state it is in; e.g., if the way were by a swing bridge over a canal, he would not be entitled to try to get across while it was open.

C. A. Russell, K.C., in reply.

COZENS-HARDY M.R. This case has been extremely well argued, and I do not think anything would be gained by postponing judgment. I recognize that the case is an important one, but as I have formed a conclusion in my own mind which is satisfactory, I think it better at once to deliver judgment.

I hope that I shall never depart from the fundamental rule that the learned county court judge is the tribunal to find the facts; but when, as in the present case, the facts are all found, or admitted, then the only question which came before the county court judge was this: What is the true inference to be drawn from these known facts? That was the problem which the county court judge put before him, as appears by his judgment. It was one which he himself treated as a question of law, for he said, "If I am wrong, I may be set right by a superior Court," which clearly means that he treated it as a question of law, for unless it was a question of law it was not one which it was open to us to consider. I am clearly of opinion that it is open to us in a case like this, where the facts are not in dispute, where they have all been found by the tribunal dealing with the facts, to say that the inference which the judge drew from those facts and the conclusion at which he arrived on those facts are wrong in point of law. We sometimes say the judge has misdirected himself; but if the learned judge draws from the admitted facts

(1) [1903] 1 K. B. 204.

a wrong conclusion in point of law, I care not whether you call it misdirection or not, that is a decision which is open to review in this Court.

The facts found by the learned judge, and not in dispute, are these: A collier was employed at the respondents' colliery, and went there every morning. Through some mishap to the machinery the men had to come up from the pit earlier than usual and had to go home. This man came up and went home by the route which he had adopted during the whole time of his engagement. I think he had been there for eighteen months. For those eighteen months, with the single exception of Saturdays, when he had to go to the pay office, this collier always went from the colliery through a door, down some steps, and across certain lines of railway upon which the colliery trucks are moved backwards and forwards as occasion may require. Not only this particular collier, but all the colliers coming from that same district, used this way. It is true that there were two other ways by which the collier might have left the colliery premises and gone to his home; one was by crossing a bridge and going a little further round, and the other was in a different direction. But the learned county court judge finds in the clearest possible language this: that "the way the applicant went on the day of the accident was the usual one for him to go, the usual one for the other men who lived in the same direction to go, and the one and only way which he and they went, except on Saturdays. I am driven to the conclusion, that being so, that it was with the knowledge of the respondents that the men went that way, and the respondents never suggested to the men that they should not go that way." When he went on this particular occasion through that door and down those steps, as he had done for eighteen months, there were trucks on the line, and he with the other men who were coming away at the same time, two of whom, I think, gave evidence, was passing between two of the trucks when there was some shunting operation, of which no warning was, I presume, given, and the unfortunate man had the wheels of one truck driven over his legs, and I think he has had both legs amputated. What was the duty of this man? What was really the implied

C. A. 1909

GANE v. NORTON HILL COLLIERY COMPANY.

Cozens-Hardy M.R.

term of his employment? That he should when his day's work was over, without loitering, and with all reasonable speed, leave the colliery premises by the accustomed and permitted route. That is what he did. It was in the course of his doing so that the accident happened. I feel bound to say in point of law that this accident, which happened in the immediate neighbourhood of the pit's mouth, close to the screen on the colliery premises, was an accident which happened in the course of his employment. The course of a collier's employment is plainly not limited at one end by the moment when he gets to the place where he is to use his pick, or at the other end by the moment when he comes up from the pit. It must include a reasonable interval of time and of space during which the employment lasts. I do not think I need repeat what I said in the *Colliers' Train Case.* (1) I must not be taken to lend any colour to the suggestion that a workman is entitled to the protection of the Act during the whole period necessary to get to his own house from the factory where he is employed; but in a case like this it seems to me quite impossible as a matter of law to say on these admitted facts that the accident, having happened where it did and at the time it did, was not an accident which happened in the course of the collier's employment. For these reasons I think the learned county court judge, who himself expressed very great doubt as to the inference he ought to draw, did not draw the right inference. I think our conclusion must be that this accident did arise in the course of the employment as well as out of it, and, therefore, that compensation ought to be awarded to the workman.

FARWELL L.J. I am of the same opinion. I have come to the conclusion that this is a question of law with which we can deal. The learned county court judge has carefully and lucidly found for us the facts which were put in evidence before him. The question whether on the facts so found the case is one of employment within the meaning of the Act is a question of the construction of the Act.

It is well settled that the employment is not confined to the

(1) *Cremins* v. *Guest, Keen & Nettlefolds*, [1908] 1 K. B. 469.

actual working whether in a pit or at any other trade in which the workman may be engaged. He is employed not only to work in the pit, but also to do other things that he is entitled to do by virtue of his contract of employment; for example, he is entitled to do, and therefore employed to do, such acts as coming on the employer's premises, passing and repassing for all legitimate purposes connected with his work on the premises, such as getting to the pit's mouth, going to get his wages, going to make proper inquiries from proper officers, or taking a train which he is entitled to use by virtue of his contract of service, as in the cases of *Cremins* v. *Guest, Keen & Nettlefolds* (1) and *Holmes* v. *Great Northern Ry. Co.* (2) All those things that he is entitled to do by virtue of his contract he is for the purposes of the Act employed to do, and they are therefore within his contract of employment. I would qualify this by saying that he must make a reasonable user of the facilities and rights which are given to him in this way. I am led to make that observation by Mr. Simon's argument with regard to the swing bridge. It is obvious to my mind that it cannot be said that because by the terms of a man's employment he was entitled to use a way out of the works over a swing bridge, he is entitled to jump across when the swing bridge is open for the purpose of some boat or barge passing through. It would not be a question of negligence or misconduct, or anything of the sort, but it would not be within the terms of his employment that he should use the swing bridge when open at all. It may well be within the terms of the employment to use a track when it is properly and fairly open, but not to use it when it is not. The fact that the workman chose to cross the line at a time when trucks were standing there is disposed of by the learned county court judge. He does not rely on the fact that the trucks were there as shewing that the path was not open to the man to use if he thought fit, but he has found that the trucks and engines were put upon the line, and that the trucks would reach up to the screen where the coal is put on. He also found that the way the man went on the day of the accident was the usual one for him to go and the usual one for other men to go. I

(1) [1908] 1 K. B. 469. (2) [1900] 2 Q. B. 409.

C. A. 1909

GANE v. NORTON HILL COLLIERY COMPANY.

Farwell L.J.

understand that to mean that, notwithstanding the fact that the line was covered by trucks, as it was habitually, the men always used that route. That being so, it appears to me to come within the definition I have attempted to give of what I understand the word "employment" in the Act to mean. I think, therefore, in the present case the true inference from the proved facts, with which we do not interfere in any way, is that on the true construction of this Act of Parliament the accident arose out of and in the course of the employment of the workman.

KENNEDY L.J. I am of the same opinion. In a sense every inference as to whether or not a thing is in the course of the employment or arising out of the employment is a question of fact. But the question is a question of law for us where the facts are admitted, because we have to say, not whether a jury might decide, but whether it is a case of being in the course of the employment and arising out of the employment where those words have been used in this particular Act of Parliament. I must confess I was a little surprised to hear the stress that was laid upon this as being an appeal on facts when the learned judge below did not so regard it and has so stated. Even in my own experience in this Court we have had arguments time after time, for example, as to whether the employment of a particular person was casual or not, where the facts have been undisputed; we have dealt more than once with the question, for instance, as to whether the employment of a window cleaner coming to work under certain admitted circumstances, which indicated or did not indicate a permanence or stability of contract, was casual employment within the Act or not. Of course, if there are disputed facts, the judge below is the sole tribunal. If there is evidence on both sides of those facts, however we might hesitate ourselves, if we had all the conflicting facts before us, to come to the same conclusion, we are not at liberty to interfere with his judgment. But where, as here, facts which are not in conflict with each other, or do not on the face of them point to different conclusions, are found by the judge, and he has not to decide between the oral evidence of A. and B., or between inferences of fact to be drawn from circumstances which point

different ways, it seems to me to be clearly an instance in which we are the interpreters of the true meaning of those facts in deciding as to the applicability of the statute. This seems to me to be a case in which it may be rightly contended by the present appellant that all the facts point in one direction only. The learned judge has been most careful in this case, and evidently given it the closest attention, but I think, with all respect, that he has gone wrong, and that there was no evidence to justify the finding to which he came. I asked, in the course of the argument that was addressed to us by Mr. Simon for the respondents, what fact could he point to other than facts on which the other side might rely, and I was told of two—first, the existence of three ways from the colliery, and, secondly, that though he took this route, there was no direction to him to take it. To my mind the respondent cannot rely on those facts at all. I do not think it matters whether there were three ways or twenty ways, if they were all ways by which the workman, faithfully doing his duty to his employer, would with that employer's knowledge be entitled to go. That is the case found by the learned judge here. No doubt one does look, as Farwell L.J. has said, with some closeness to the question when you have, as you have here, a way which at the time had trucks across it; but I read the finding of the learned judge clearly to mean that the applicant in going by this way, with or without trucks on the route, was taking a course which the employers knew that their men would take, and which he himself by experience had found himself authorized by them to take, during the eighteen months he had been there. On this particular occasion, it appears that two men immediately in front of him had passed over in safety, doing the same thing he did; therefore, if there was any inference to be drawn, it would be this—that somebody carelessly, although he ought to have known that the employers recognized this as the daily method of going from the works used by a large number of men, chose to set the trucks in motion when this unfortunate man was in a position to cross, and when he had a right to say "This is the way which my employers recognize, and their servants ought to know that it is being used by us." But, be that as it may, I am quite sure,

C. A. 1909

GANE v. NORTON HILL COLLIERY COMPANY.

Kennedy L.J.

if there had been anything which you might call a deviation from the natural course of the servant's employment in going as he did, the learned judge would have found it; and, what is more, I have no doubt evidence would have been adduced by the other side to shew that it was so.

Upon the facts as stated by the learned county court judge it seems to me there is only one reasonable inference, and that is that this man was, within the meaning of the statute, acting in the course of his employment, and that the accident arose out of that employment in the sense that it arose in the natural and proper performance of his duty. He was quitting his employment, still upon the premises of the employer (although of course that is in itself by no means decisive), at a place under the employer's control, and at a place where he was authorized to be by the employment for the purpose of leaving the premises, as he was obliged to leave, when his day's work was over. It seems to me that the learned county court judge's hesitation was well warranted, and that the appeal ought to be allowed.

Appeal allowed.

Solicitors: *Darley, Cumberland & Co., for Gilmore & Lloyd, Bristol; Ford & Ford, for F. E. Metcalfe, Bristol.*

J. R. B.

HARPER & CO. *v.* VIGERS BROTHERS.

1909

May 11, 25.

Principal and Agent—Shipbroker—Charterparty—Signature as Agent—Right to sue as Principal.

By a contract in charterparty form, dated February 3, 1908, between the plaintiffs, who were shipbrokers, and the defendants, who were timber merchants, in which the plaintiffs were described as agents for owners of a steamship to be named later, and the defendants as charterers, it was agreed that the steamship should load at a foreign port about the latter half of June a cargo of timber from the agents of the charterers, and should deliver the same in London on being paid freight at a certain rate. The contract was signed by the plaintiffs "by authority of and as agents for owners." The plaintiffs were not in fact acting for principals, nor had they made a contract for a steamship to carry the cargo, but were themselves principals in the transaction. This was, however, not known to the defendants. On May 22 the plaintiffs entered into a charterparty with shipowners for the charter of a steamship to carry the cargo, the plaintiffs being described therein as agents for charterers, at a rate of freight less than that specified in the contract of February 3. The defendants' names were inserted by the plaintiffs in the charterparty as the charterers, and the charterparty was signed by the plaintiffs "as agents for merchants." In making the charter the plaintiffs were not in fact acting as agents for the defendants, but were themselves principals. The cargo was shipped under bills of lading reserving freight at the rate specified in the charter of May 22, and was duly delivered at the port of discharge, and the bills of lading freight was paid. In an action by the plaintiffs to recover the difference between the freight so paid and that reserved by the contract of February 3 the defendants contended that, as the plaintiffs had made that contract as agents, they were not entitled to sue upon it as principals:—

Held, that as the plaintiffs in making the contract of February 3 had in fact no principals, but were themselves the principals, they were entitled to sue upon it and to recover the freight reserved thereby.

Action to recover 68*l.* 7*s.* 4*d.*, balance of freight for the carriage of goods in the steamship *Hektos*.

The plaintiffs were shipbrokers (1) and the defendants were timber merchants. Early in 1908 negotiations took place between the plaintiffs and the defendants for the supply of a steamship to carry a cargo of timber to London in the summer of that year, and in the result on February 3 a contract, which

(1) The plaintiffs also owned certain ships, but this fact became immaterial in the present case.

1909

HARPER & Co. v. VIGERS BROTHERS.

the plaintiffs described in their points of claim as a contract in charterparty form, was entered into between them. The contract, which was on a printed form headed "Chamber of Shipping Wood Charter (Scandinavia and Finland) to the United Kingdom, 1899," so far as material was as follows: "It is this day mutually agreed between H. G. Harper & Co." (the plaintiffs) "as agents for owners of the good steamship called the —— to be named later . . . . now expected ready to load about second half of June, but lay days not to commence before 15th June, and Messrs. Vigers Brothers of London, charterers. 1. That the said steamship . . . . shall with all convenient speed . . . . proceed to Koivusaari (Wyburg district) . . . . and there load, always afloat, from the agents of the said charterers as a full and complete or part cargo about 935 standards mill sawn deals and/or battens and/or boards and/or scantlings and/or slatings in bundles . . . . with a sufficient quantity of ends, 8 feet and under, for broken stowage only . . . . and being so loaded shall therewith proceed to London, Surrey Commercial Dock, or so near thereto as she may safely get, and deliver the same, always afloat, on being paid freight as follows:—For deals and battens, boards and scantlings, 1*l.* 1*s.* 6*d.* per St. Petersburg standard hundred of 165 cubic feet; for slatings, 1*l.* 5*s.* 0*d.*" per the same standard; and "for ends for broken stowage, 8 feet and under, two-thirds freight" per the same standard; "in full of all port charges and pilotages." 2. "The master or owners to telegraph the shippers of the cargo (telegraphic address as per margin) giving the charterers' names and giving at least six clear days' notice of the probable date of steamer's arrival at the loading port . . . ." By other clauses the cargo was to be loaded and discharged with customary steamship despatch, with a provision for demurrage, and delay caused by a strike or lock-out or by an epidemic was not to count as part of the loading or discharging time; the bills of lading were to be prepared on the form indorsed on the charter, and to be signed by the master, quality, condition, and measure unknown, freight and all conditions, clauses, and exceptions as per the charter, and the owner was to be responsible for the number of pieces signed for by the master, fire and fraud excepted. A list of exceptions was

then set out. The other material clauses were as follows:— 9. "The freight to be paid in cash without discount (less freight advance, if any) on unloading and right delivery of the cargo." 13. "The master or owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage, and average." 15. "The brokerage is at five per cent. and is due to H. G. Harper & Co. on the signing hereof, and the steamer is to be reported by them at the custom house at the port of discharge. Owners to have liberty of loading other goods before and/or after shipment of above in Wyburg district and/or other districts." The contract was signed by the plaintiffs as follows: "By authority of and as agents for owners, (sgd.) H. G. Harper & Co." In the margin of the contract were the words "H. G. Harper & Co., shipbrokers, 14, St. Mary Axe, London, E.C.— Telegraphic address, 'Harpering, London.'"

The rate of freight specified in the above contract was the then market rate of freight for such a charter. At that date the plaintiffs had not made any contract with shipowners for the supply of a steamship to carry the cargo, nor were they acting for a principal, but they were themselves principals in the transaction. This fact, however, was not known to the defendants.

On May 22, 1908, a charterparty, which was on a printed form similar to that of the contract of February 3, was entered into between the plaintiffs and Messrs. Ollgaard and Thoersen, which, so far as material, was as follows: "It is this day mutually agreed between Messrs. Ollgaard and Thoersen as agents for Angfartygs Aktiebolaget Finska Lloyd, owners of the good steamship called the *Hektos* . . . . of 935 St. Petersburg standards . . . . now expected ready to load second half June, but lay days not to commence before 15th June, and H. G. Harper & Co., of London, as agents for charterers. 1. That the said steamship . . . . shall with all convenient speed . . . . proceed to Koivusaari (Wyburg district) . . . . and there load, always afloat, from the agents of the said charterers a full and complete cargo of mill sawn deals and/or battens and/or boards and/or scantlings and/or slatings in bundles . . . . with a sufficient quantity of ends, 8 feet and under, for broken stowage only . . . . and being so loaded shall therewith proceed

1909

HARPER & Co. v. VIGERS BROTHERS.

to London, Surrey Commercial Dock, or so near thereto as she may safely get, and deliver the same, always afloat, on being paid freight as follows:—For deals and battens, boards, slatings and scantlings, 1*l.* per St. Petersburg standard hundred of 165 cubic feet; for ends for broken stowage, 8 feet and under, two-thirds freight" per the same standard; "in full of all port charges and pilotages." In clause 2, which was similar to clause 2 of the contract of February 3, after the words "giving the charterers' names," the words "namely, Vigers Bros." were inserted by the plaintiffs. The other clauses were the same as in the contract of February 3, with the exception of clause 15, which ran as follows: "The brokerage is at 2½ per cent. to S. Ollgaard and Thoersen, half which is due to H. G. Harper & Co. on the signing hereof, and the steamer is to be reported by them at the custom house at port of discharge." This charterparty was signed by Messrs. Ollgaard and Thoersen as agents for owners, and by the plaintiffs as follows: "(sd.) H. G. Harper & Co., as agents for merchants"; and in the margin were the same words as in the margin of the contract of February 3. In entering into this charterparty the plaintiffs acted as principals and not as agents for the defendants.

On June 5 the plaintiffs wrote to the defendants stating that the steamship *Hektos* would fulfil the charterparty of February 3. The cargo was shipped at Koivusaari during the second half of June under bills of lading which stated that the cargo was to be delivered at the Surrey Commercial Dock, London, unto order or to assigns, "he or they paying freight for the same as per charterparty dated the 22nd May, 1908, all the terms and exceptions contained in which charter are herewith incorporated."

The steamship arrived in the Surrey Commercial Dock on July 2, and the owners on that day gave notice thereof to the defendants, and directed them to pay the freight to the plaintiffs on their behalf. The discharge was completed on July 8. Correspondence then ensued between the plaintiffs and the defendants, in which the defendants stated that they found that the freight payable under the charter of May 22 was only at the rate of 1*l.* per standard, and they claimed to pay freight at that rate. The plaintiffs took up the position that they were principals in

the transaction and were entitled to be paid the rate of freight specified in the charter of February 3, as they took the risk of the freight rising, and would have had to pay the difference themselves in such a case. On July 15 the plaintiffs served a stop notice upon the Surrey Commercial Dock Company under s. 494 of the Merchant Shipping Act, 1894, claiming a lien for unpaid freight and dock dues, but the plaintiffs withdrew the stop notice upon being paid the balance of freight due at the rate of 1*l.* per standard and the proper proportion of the dock dues. The action was brought to recover the balance of freight under the contract of February 3. The defence, so far as material, was a denial that there was any contract between the plaintiffs and the defendants, or that the plaintiffs had any right to sue.

At the trial the plaintiffs gave evidence that they had no principal when they entered into the contract of February 3; that they took the risk of the freight rising, the speculation in freight being merely to enable them to earn the brokerage, and that only one brokerage, that of 2½ per cent., was payable upon the two contracts; that it was a usual way of making a contract when the broker did not know what ship would fulfil the contract; and that they could give no reason for signing the charter-party of May 22 "as agents for merchants," but that it was merely a business way of signing.

The defendants gave evidence to the effect that, if they had known when making the contract of February 3 that the plaintiffs had no principal who was ready to provide a steamer to fulfil the contract, but were merely speculating in freight, they would not have entered into the contract, and that they looked to the plaintiffs as independent persons acting in the matter between them and a shipowner, who would have a steamer ready to fulfil the contract.

J. E. Bankes, K.C., and *Adair Roche*, for the plaintiffs. The plaintiffs, though signing the contract of February 3 as agents, were really principals in the transaction. They made a forward contract to provide a ship in June, and they took the risk of being able to find a ship to fulfil the contract of February 3 at

1909

HARPER & Co. v. VIGERS BROTHERS.

or below the rate of freight specified. If freights had risen they would have had to pay the difference themselves. The plaintiffs, having contracted as agents for an unknown and unnamed principal, are entitled to sue upon the contract: *Schmaltz* v. *Avery* (1); and having performed the contract they are entitled to recover the freight payable thereunder.

Bailhache, K.C., and *Maurice Hill*, for the defendants. The plaintiffs are described in both documents as shipbrokers, and they signed the first document "as agents for owners" and the second document "as agents for merchants." The object must have been to conceal the true state of facts. There is an obvious difference between a contract with a shipowner, who has a ship ready to perform the contract, and a contract with a mere speculator in freights; and the evidence shews that if the defendants had known that the plaintiffs had no principal behind them they would not have entered into the contract of February 3. That being so, in the first place evidence was not admissible to shew that the plaintiffs were the principals in the transaction, because such evidence contradicted the written contract which described the plaintiffs as agents: *Humble* v. *Hunter* (2); *Fawkes* v. *Lamb.* (3) In *Schmaltz* v. *Avery* (1) evidence was admitted without objection that the plaintiff was in fact the principal. (4)

Next, assuming that the evidence is admissible, the law as laid down in *Schmaltz* v. *Avery* (1), that an agent who contracts for an unknown and unnamed principal but who has in fact no principal can himself sue upon the contract as principal, has not been followed. In Carver on Carriage by Sea, 4th ed., s. 128, it is stated that in such a case "probably he may sue or be sued on the contract," thus shewing that in the opinion of that learned author the law is not considered as settled by that case. In the two later cases of *Fairlie* v. *Fenton* (5) and *Sharman* v. *Brandt* (6) it is laid down in clear terms that where a person makes a contract as agent for an undisclosed principal the agent cannot sue as principal. These are both cases of

(1) (1851) 16 Q. B. 655.
(2) (1848) 12 Q. B. 310.
(3) (1862) 31 L. J. (Q.B.) 98.
(4) 16 Q. B. 655, at p. 658.
(5) (1870) L. R. 5 Ex. 169.
(6) (1871) L. R. 6 Q. B. 720.

contracts by brokers. In *Sharman* v. *Brandt* (1) the plaintiff contracted as agent for an unnamed principal, whereas in fact he had no principal, and it was held that he could not sue as principal upon the contract. In *Fairlie* v. *Fenton* (2) the plaintiff contracted as agent for a named principal, and it was held that he could not sue upon the contract, but the language of the judges is quite general and applies to the case of a broker contracting for an undisclosed principal. Those two decisions are later than *Schmaltz* v. *Avery* (3) and lay down the general rule to which *Schmaltz* v. *Avery* (3) is an exception.

If, however, the decision in *Schmaltz* v. *Avery* (3) has not been affected by the two later cases, that case is distinguishable. In the first place, the contract sued upon in that case was not a broker's contract, whereas the contracts sued upon in *Fairlie* v. *Fenton* (2), *Sharman* v. *Brandt* (1), and in the present case were brokers' contracts. In the next place, as appears from the report of *Schmaltz* v. *Avery* in 15 Jurist, 291, evidence was given that the defendant knew that the plaintiff was himself the principal, and therefore he could not be heard to say that the plaintiff was only an agent. Again, in that case there is no statement in the report as to the form of the plaintiff's signature to the charterparty. He may have signed his name so as to make himself personally liable, and not merely as agent. Here the plaintiffs signed as agents for owners. Further, in *Schmaltz* v. *Avery* (3), though the plaintiff is described in the charterparty as agent of the freighter, he was in fact himself the freighter, and was therefore the principal. That is pointed out in *Carr* v. *Jackson* (4) as the true reason for the decision in that case, and it is borne out by the passage at the end of the judgment of Patteson J. in *Schmaltz* v. *Avery* (5), where he says that "a man cannot in strict propriety of speech be said to be agent to himself. Yet, in a contract of this description, we see no absurdity in saying that he might fill both characters; that he might contract as agent for the freighter whoever that freighter might turn out to be, and might still adopt that character of freighter

(1) L. R. 6 Q. B. 720.
(2) L. R. 5 Ex. 169.
(3) 16 Q. B. 655.
(4) (1852) 7 Ex. 382.
(5) 16 Q. B. at p. 663.

1909

HARPER & Co. v. VIGERS BROTHERS.

himself if he chose." In the present case, if the plaintiffs had been in fact the owners of the ship which performed the contract of February 3, the case would have come within the decision in *Schmaltz* v. *Avery*. (1) They were not the owners of the *Hektos*, and therefore the case comes within the decisions in *Fairlie* v. *Fenton* (2) and *Sharman* v. *Brandt* (3), and not within the decision in *Schmaltz* v. *Avery*. (1)

The remaining point is that when the steamship *Hektos* was named by the plaintiffs in the letter of June 5, before the contract was performed, as the vessel which was to carry out the contract of February 3, there was from that date a named principal, namely, the owners of the *Hektos*, in the contract of February 3. It was the same as if their names were written into the contract as the shipowners who were to carry the cargo. They became from that date the named principals of the plaintiffs, and in those circumstances the plaintiffs cannot sue upon the contract as principals. The defendants therefore are entitled to judgment.

J. E. Bankes, K.C., in reply. Evidence to shew that the plaintiffs were really the principals in the transaction, though stating themselves to be agents, was admissible. "The true rule . . . . is that the parol evidence is admissible for the purpose of introducing a new party, but never for that of discharging an apparent party to the contract": Notes to *Thomson* v. *Davenport*. (4) That statement of the law has appeared in every edition of Smith's Leading Cases. Evidence to shew that a person contracting prima facie as agent is in fact the principal is admissible so as to make him liable upon the charterparty: *Carr* v. *Jackson*. (5) If he is liable upon the charterparty he is entitled to sue upon it, because his rights and obligations must be reciprocal.

With reference to the main question the decisions in both *Fairlie* v. *Fenton* (2) and *Sharman* v. *Brandt* (3) turned upon the character in which the plaintiff in the respective cases signed the contract. In *Fairlie* v. *Fenton* (2) the plaintiff was a broker

(1) 16 Q. B. 655.
(2) L. R. 5 Ex. 169.
(3) L. R. 6 Q. B. 720.
(4) 2 Sm. L. C., 11th ed., p. 413.
(5) 7 Ex. 382.

in the city of London and signed a contract for the sale of cotton as broker. That class of broker is always considered as signing the contract as agent for both parties, which is not the case with a shipbroker. It was accordingly held that he could not sue as principal upon the contract. Further, he named his principal in the contract, and upon that ground also he was not entitled to sue as principal. In *Sharman* v. *Brandt* (1) the plaintiff was employed by the defendants as their agent to buy for them in the market a quantity of hemp, and the contract note, which he signed as broker, stated that he bought the hemp for the defendants. The plaintiff sold his own goods to the defendants, having no principal as seller in the transaction, and it was properly held that he could not sue the defendants upon the contract as principal. That is a sufficient ground upon which to distinguish that case from the present one, and it is expressly put upon that ground by Martin B. in his judgment. The other point in that case was that the contract note signed by the plaintiff as broker, when he was really the principal, was not a sufficient note of a contract between the plaintiff as unnamed principal and the purchaser within s. 17 of the Statute of Frauds. That is the ground upon which Kelly C.B. and Channell B. expressly based their judgments, the report of the judgment of Kelly C.B. in the *Law Journal* (2) shewing that what he said was this, that a written contract expressed to be made by a person as broker, who is really a principal, is not a note of a contract between the broker as unnamed principal and the purchaser. The case does not decide that a broker signing a contract for an unnamed principal cannot himself sue as principal if he is really such. Neither in *Fairlie* v. *Fenton* (3) nor in *Sharman* v. *Brandt* (1) was *Schmaltz* v. *Avery* (4) cited, and if it had been intended to raise in the two later cases the same point as was decided in the earlier case, that case would have been referred to. *Schmaltz* v. *Avery* (4) is therefore left untouched and governs the present case.

Cur. adv. vult.

(1) L. R. 6 Q. B. 720.
(2) 40 L. J. (Q.B.) 312, at p. 314.
(3) L. R. 5 Ex. 169.
(4) 16 Q. B. 655.

1909

HARPER & Co. v. VIGERS BROTHERS.

May 25. PICKFORD J. In this case the plaintiffs sued the defendants for the balance of freight alleged to be due under what the plaintiffs in their points of claim call a contract in charterparty form. The facts are these. The plaintiffs are shipbrokers and also, as they allege, shipowners, but for the purposes of this case they may be taken as being only shipbrokers. They negotiated a contract, dated February 3, 1908, with the defendants for the carriage of a cargo of timber. The contract begins thus: "It is this day mutually agreed between H. G. Harper & Co. as agents for owners of the good steamship . . . . to be named later . . . . and Messrs. Vigers Brothers of London, charterers," that the steamship should load the cargo and deliver it at the Surrey Commercial Dock, London, at a certain rate of freight, namely, for deals and battens, boards and scantlings, 1*l.* 1*s.* 6*d.* per standard; for slatings, 1*l.* 5*s.* per standard; and for ends for broken stowage, 8 feet and under, two-thirds freight per standard. The contract provides for brokerage at 5 per cent. due to the plaintiffs on the signing thereof, and the document is signed by the plaintiffs as follows: "By authority of and as agents for owners, (sgd.) H. G. Harper & Co."

That document is an entire misrepresentation of the true state of things. The plaintiffs were not acting as agents for any owners at all. They had no ship at that time which was going to fulfil the charter, nor had they any agreement with any owner that the latter would provide a ship for the purpose. They had in fact no principals. It is said that the transaction was a mere speculation by the plaintiffs in freight, and no doubt that was involved in it, because, if the plaintiffs could not get a ship at the rate of freight specified, they would have to pay the difference in the freight themselves, and so lose money; whereas if, as happened in the present case, they obtained a ship at a lower rate of freight, they would keep the difference themselves, and so put money into their own pockets. I think, however, that Mr. Harper, of the plaintiffs' firm, who gave evidence before me, is correct in saying that that was not the primary object of the contract; the primary object was to get brokerage; and the plaintiffs probably realized that, if the defendants had

known that the plaintiffs were not acting for a shipowner, but were only contracting on their own behalf, taking their chance of finding a ship, it was very probable that the defendants would not have entered into the contract and that the plaintiffs would not get the brokerage.

Having made that contract, the plaintiffs on May 22, 1908, made another contract with foreign shipowners for the charter of a steamship called the *Hektos* to fulfil the contract of February 3. That charterparty begins thus: "It is this day mutually agreed between Messrs. Ollgaard and Thoersen as agents for" the owners of the *Hektos* "and H. G. Harper & Co., of London, as agents for charterers," that the *Hektos* should load the cargo and deliver it at the Surrey Commercial Dock, London, at the following rate of freight: For deals and battens, boards, slatings, and scantlings, 1*l.* per standard; and for ends for broken stowage, 8 ft. and under, two-thirds freight per standard. That rate of freight is thus less than that which the defendants agreed to pay under the contract of February 3. The charterparty contains this clause: "The master or owners to telegraph the shippers of the cargo (telegraphic address as per margin) giving the charterers' names, namely, Vigers Bros., and giving at least six clear days' notice of the probable date of steamer's arrival at the loading port." This clause is also in the contract of February 3, with the exception of the words "namely, Vigers Bros.," which were written into the charterparty of May 22 by the plaintiffs. The charterparty is signed "H. G. Harper & Co. as agents for merchants."

That document again is just as absolutely a misrepresentation of the true state of things as the first document. The plaintiffs were not acting as agents for the defendants, whose names they took upon themselves to insert in the charterparty as charterers. They made no contract between the defendants and the owners of the *Hektos*, nor were they acting as agents for merchants, although they so described themselves in their signature to the charterparty. It is not necessary to consider what object the plaintiffs had in view in making the contract in that form. Mr. Harper said that he could not tell me. He said it was a matter of business. It may be so, but I will only say this, that when I

1909

HARPER & Co. v. VIGERS BROTHERS.

Pickford J.

find one party to a negotiation carefully concealing the true nature of the transaction and representing it to be something other than it really is, I am inclined to come to the conclusion that it is not done for the advantage of the other party to the negotiation. However, it is not necessary for me to form any conclusion upon that, because it does not affect the legal relations between the plaintiffs and the defendants, and it really is only a matter of prejudice.

Having made that charter, the plaintiffs on June 5 declared the *Hektos* to the defendants as the steamship which would fulfil the contract of February 3. It was contended on behalf of the defendants that that altered the position of the plaintiffs; that whereas up to that time they had no principals, from that time they were acting for principals whom they named, namely, the owners of the *Hektos*. I do not think that that contention is correct. The owners of the *Hektos* never were principals under the contract of February 3. There never was any contract made between the owners of the *Hektos* and the defendants except by the bills of lading afterwards signed. I think that the facts remained exactly the same after the declaration of the *Hektos* as before, namely, that the plaintiffs had contracted ostensibly as agents, but were themselves really the principals.

The goods were shipped under bills of lading which made the freight payable "as per charterparty dated the 22nd May, 1908." That freight, as I have said, was less than the freight specified in the contract of February 3. When the cargo arrived a dispute at once arose as to the amount of freight payable. The defendants contended that they were only bound to pay the freight specified in the charterparty of May 22, as the contract of February 3 was between them and the plaintiffs as agents for the owners of a steamship to be named later, namely, the *Hektos*. The plaintiffs, on the other hand, claimed freight at the rate specified in the contract of February 3, as being themselves the principals in the transaction. The defendants having paid the freight as specified in the charterparty of May 22, the plaintiffs have brought this action to recover the difference between that sum and the freight specified in the contract of February 3.

1909

HARPER & Co. v. VIGERS BROTHERS.

Pickford J

The contention put forward on behalf of the plaintiffs is that the decision in *Schmaltz* v. *Avery* (1) exactly covers the present case. In Carver on Carriage by Sea, 4th ed., s. 128, that learned writer, refering to *Schmaltz* v. *Avery* (1), says: "Where a charterparty has been made by an agent expressly on behalf of a principal the agent is not personally liable upon the contract; even though the principal be a foreign one; and although he may not have authorized the supposed agent to make the contract. If the agent was not authorized no binding contract at all has been concluded, unless it can be shewn that the agent had no principal at all and was in fact contracting for himself; in which case probably he may sue or be sued on the contract." The facts in the present case are precisely as there stated. It is shewn that the plaintiffs, who made the contract as agents, had no principal and were in fact contracting for themselves, and the case of *Schmaltz* v. *Avery* (1) seems to me to decide that in such a case the plaintiffs can themselves sue upon the contract. It is not necessary for me to refer to the judgment in that case further than to point out that it is there said that the person contracting as agent and having no principal may be considered as agent for himself, which seems to me to be a somewhat curious position. However that may be, the plaintiff in that case, who described himself in the charterparty as agent of the freighter, was himself the freighter, and was held entitled to sue upon the charterparty. In a note to the passage which I have read from Carver on Carriage by Sea he cites *Schmaltz* v. *Avery* (1), but says "compare *Sharman* v. *Brandt*." (2) That case and the case of *Fairlie* v. *Fenton* (3) were relied upon on behalf of the defendants as being inconsistent with *Schmaltz* v. *Avery* (1), and as shewing that the plaintiffs were not entitled to sue. It seems to me that what I have to decide is whether this case comes within the decision in *Schmaltz* v. *Avery* (1) or within the decisions in *Fairlie* v. *Fenton* (3) and *Sharman* v. *Brandt*. (2)

Now *Fairlie* v. *Fenton* (3) may be put aside at once, because, as I understand the facts in that case, the plaintiff contracted

(1) 16 Q. B. 655. (2) L. R. 6 Q. B. 720.
(3) L. R. 5 Ex. 169.

1909

HARPER & Co. v. VIGERS BROTHERS.

Pickford J.

for a principal, whom he named, and there was such a principal. The main argument was that a broker, like an auctioneer, could sue in his own name upon the contract as having an interest in the contract, although he contracted for a named principal, but this contention was not accepted. It was held that the plaintiff, having contracted as agent for an existing named principal, could not sue upon the contract as principal. That case therefore is no authority for the defendants' contention. The case of *Sharman* v. *Brandt* (1) is rather more difficult to deal with because it is not quite clear how far it turned upon the Statute of Frauds and how far upon the general law, but there are, no doubt, some expressions in it which seem to be contrary to the decision in *Schmaltz* v. *Avery*. (2) In *Sharman* v. *Brandt* (1) the plaintiff, who was suing in his own name upon the contract as principal, was instructed by the defendant to go into the market and buy for him a certain quantity of hemp. The plaintiff was therefore acting as agent for the defendant in making the purchase, and the Court very properly held that he could not make himself a principal in the contract of sale, and as such sue the defendant for breach of the contract. Therefore I do not think that these cases, when they are examined, really touch the decision in *Schmaltz* v. *Avery*. (2)

It was further contended that the present case is distinguishable in other respects from *Schmaltz* v. *Avery*. (2) One of the suggested distinctions, namely, that resulting from the declaration of the *Hektos* on June 5, I have already dealt with. Another suggested distinction is that in *Schmaltz* v. *Avery* (2) the contract was not a brokerage contract. I confess that I do not see that that makes any difference. A broker is only an agent. There may be some brokers who perform somewhat peculiar functions differentiating them in that respect from other agents; but a shipbroker is only an agent to make a charter, just as any one else may be an agent to make a charter. It was then said that there was nothing in the report of *Schmaltz* v. *Avery* (2) to shew how the charterparty was signed, and it might be that it was signed by the plaintiff in his personal capacity and not as an agent, and that that might well account for the decision that he

(1) L. R. 6 Q. B. 720. (2) 16 Q. B. 655.

was entitled to sue. I need only say that that was not the ground upon which the case was decided. No doubt it does not appear from the report what the form of the signature was, but on the other hand it nowhere appears in any part of the judgment that the form of the signature was in any way a matter which influenced the decision of the Court in that case. Lastly, it was pointed out that in that case the plaintiff was himself the freighter and therefore the principal, whereas in the present case the plaintiffs were not the shipowners, but procured another shipowner to perform the contract. I do not think that that makes any difference. It does not seem to me to make any difference whether the plaintiffs named their own ship or a ship which they had chartered and which they had at their disposal to perform the contract.

For these reasons the suggested distinctions between this case and *Schmaltz* v. *Avery* (1) fail, and I cannot see any distinction between that case and the present one. The plaintiffs are therefore entitled to recover. But I am satisfied that, if the plaintiffs had disclosed to the defendants the true state of affairs before the contract of February 3 was entered into, the defendants would probably not have made the contract at all, or, if the contract had been made, the disclosure would have prevented any litigation. In these circumstances, as the plaintiffs have, by choosing to conceal the real state of affairs, brought about this litigation, I must decline to give them any costs. There will therefore be judgment for the plaintiffs without costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Trinder, Capron & Co.*

(1) 16 Q. B. 655.

W. F. B.

1909

June 11.

BURTON, Appellant *v.* HUDSON, Respondent.

Justices—Jurisdiction—Ouster—Bona fide Claim of Right — Foreshore — Removal of Shingle—Owner—Harbours Act, 1814 (54 *Geo.* 3, *c.* 159), *ss.* 14, 28.

Sect. 14 of the Harbours Act, 1814, as amended by s. 16 of the Harbours Transfer Act, 1862, provides that no person shall take any shingle from the shore of any harbour, from which the Board of Trade shall by order prohibit the taking of shingle, upon pain of forfeiting for every such offence the sum of 10*l.*; and s. 28 provides that nothing in the Act shall take away any right of property possessed by any person in the shores of a harbour.

The Board of Trade, by order, prohibited the taking of shingle from a part of the shore of a harbour, of which shore the respondent was the owner. The respondent subsequently removed shingle from the shore, and proceedings were taken against him in a Court of summary jurisdiction under s. 14 for the recovery of the penalty. The respondent contended before the justices that he had acted under a bona fide claim of right as owner of the shore, and the justices, without considering the question whether the fact of ownership afforded any defence to proceedings under s. 14, dismissed the information on the ground that, a bona fide claim of right having been raised, their jurisdiction was ousted:—

Held, that the decision of the justices was right.

Case stated by justices of Sunderland.

The material parts of the case were as follows. On January 26, 1909, the respondent appeared before the justices sitting as a Court of summary jurisdiction at the police court in the county borough of Sunderland upon a summons, issued upon the information of the appellant, charging the respondent that he on July 17, 1908, at Ryhope, Hendon, within the port of Sunderland, did unlawfully take shingle from a portion of the shore of the said port from which the Board of Trade had by an order dated June 30, 1908, under the hand of H. Llewellyn Smith, their secretary, and published in the *London Gazette* on July 3, 1908, prohibited the taking or removing of such shingle. The respondent pleaded not guilty to the offence charged.

1909

BURTON v. HUDSON.

The proceedings were taken under s. 14 of the Harbours Act, 1814. (1)

The Board of Trade on June 30, 1908, made, and published in the *London Gazette* on July 3, 1908, the following order :—

" Shores or banks of the sea at Ryhope, Hendon, Sunderland. —Removal of materials prohibited.—Whereas the Board of Trade acting in pursuance of the Harbours Act, 1814, as amended by the Harbours Transfer Act, 1862, find it necessary for the protection of the port of Sunderland to prohibit the taking or removing of any shingle or ballast from the shores or banks of the sea between the seaward end of the road leading from the beach to Sea Beach Road, Ryhope, Hendon, and a point 535 yards north thereof, being within the said port—Now the Board of Trade do hereby, by this order, prohibit the taking or

(1) The Harbours Act, 1814 (54 Geo. 3, c. 159), s. 14 : " And, in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, be it further enacted, that no person or persons shall take any ballast or shingle from the shores or banks or any portion of the shores or banks of any port, harbour, or haven of this kingdom, from which the commissioners for executing the office of lord high admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands, or the hands of any three of them, or the hands of his or their secretary, and published in the *London Gazette*, shall (sic) prohibit the taking or removing of such shingle or ballast, upon pain of forfeiting for every such offence the sum of 10*l*."

Sect. 28 : " Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to prejudice, diminish, abridge, alter, or take away any right of property, privilege or jurisdiction, or any powers of conservancy, held, possessed, used, exercised, or enjoyed by any body corporate or politic, or by any lord or lords, lady or ladies of any manor or manors, or any person or persons whatsoever, in, to, upon, or over any of the ports, harbours, havens, roads, roadsteads, sounds, channels, creeks, bays, or navigable rivers of the United Kingdom, or to the banks, shores or sides thereof ; . . . . but that such respective rights of property, privileges, jurisdictions, and powers of conservancy shall be respectively and exclusively enjoyed in as full, ample, and beneficial a manner in every respect to all intents and purposes as if this Act had never been made ; anything herein contained to the contrary notwithstanding."

By s. 16 of the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), the powers conferred by s. 14 of 54 Geo. 3, c. 159, upon the Commissioners of the Admiralty were transferred to the Board of Trade.

1909

BURTON v. HUDSON.

removing of any shingle or ballast from the shores or banks of the sea between the points above mentioned.

"H. Llewellyn Smith,

Secretary to the Board of Trade.

"Dated June 30, 1908.

"Note.—Any person removing shingle or ballast in contravention of this notice is liable on conviction to a penalty not exceeding 10*l*."

On July 9, 1908, the solicitors of the respondent wrote to the secretary of the Board of Trade stating that their clients, as owners of a portion of the shores or banks of the sea within the area named, disputed the validity of the said order, and in order to test its validity intended to remove shingle at noon on July 17, and invited the Board of Trade to institute proceedings. The respondents did on July 17, 1908, according to the intimation contained in the said letter, remove shingle from the shores of the sea at Ryhope, Hendon.

The place from which such shingle was so removed by the respondent was within the limits of the port of Sunderland and was between the points mentioned in the said order, and was part of the land comprised in an indenture dated April 8, 1873, and made between the Queen's Most Excellent Majesty of the first part, the Honourable Charles Alexander Gore and the Commissioners of Her Majesty's Woods, Forests, and Land Revenues of the second part, and John Candlish and Ralph Milbanke Hudson of the third part, being a grant of all that piece or parcel of land or foreshore of the sea situate, lying, and being between high water mark and low water mark except as therein mentioned unto and to the use of the said John Candlish and Ralph Milbanke Hudson, their heirs and assigns, for ever.

The respondent and the executors of his brother, A. G. M. Hudson, were the successors in title of the said John Candlish and Ralph Milbanke Hudson named in the said indenture.

The respondent and his co-owners had been in the habit of taking and selling sand and shingle from the foreshore in question and had derived a large revenue therefrom.

The respondent tendered evidence to shew that it was not "necessary for the protection of the port of Sunderland to

prohibit the taking of shingle from the shores of the sea" as prohibited by the said order, but the justices declined to consider whether or not there was any such necessity, and they considered that the order was binding and conclusive in this matter.

It was contended on behalf of the respondent—

(1.) That under the indenture of April 8, 1873, the respondent had acted under a bona fide claim of right to property and that the jurisdiction of the justices was ousted.

(2.) That the rights of the respondent as owner of the foreshore were protected by s. 28 of the Harbours Act, 1814, and that no order made under s. 14 could affect such rights.

(3.) That the justices were bound to inquire whether it was necessary for the protection of the port of Sunderland to prohibit the taking or removing of shingle from the shores of the sea.

It was contended on behalf of the appellant—

(1.) That no bona fide claim of right could arise, and that it was the duty of the magistrates to proceed and determine the case under the statute.

(2.) That the construction put upon s. 28 by the respondent was repugnant to s. 14 and could not be maintained.

(3.) That the order of the Board of Trade was conclusive as to the necessity for such prohibition and the magistrates could not review it.

The justices were of opinion that the respondent had done the act complained of under a bona fide claim of right to do so, and that their jurisdiction to try the offence charged in the summons was thereby ousted, and they accordingly dismissed the charge.

The questions for the opinion of the Court were—

(1.) Was the act of the respondent done under a bona fide claim of right and was the jurisdiction of the justices thereby ousted?

(2.) Ought the justices to have considered evidence as to whether or not it was necessary for the protection of the port of Sunderland to prohibit the removal of shingle from the shores of the sea?

Sir W. S. Robson, A.-G. (*Hedderwick, Rowlatt,* and *Austen-Cartmell* with him), for the appellant. The justices have held that

1909

BURTON v. HUDSON.

their jurisdiction to try the case was ousted on the ground that the respondent, who was admittedly the owner of the foreshore from which the shingle was removed, had acted under a bona fide claim of right. In order to oust the jurisdiction of justices the claim of right must be one which can exist in law. The contention of the Crown is that s. 14 of the Harbours Act, 1814, is mainly, if not entirely, directed against the owners of the foreshore, they being the only persons who, but for this Act, would have been entitled to remove ballast or shingle from the banks or shores of ports and harbours. If this construction of s. 14 be correct, then it is clear that the owner of a foreshore who removed shingle after a prohibition order by the Board of Trade would be doing something which is forbidden by the section, and which is consequently illegal, and no question of a claim of right could arise: *Anderson* v. *Jacobs*. (1) The justices, therefore, before holding that their jurisdiction was ousted, were bound to consider and decide the question whether the removal of shingle by an owner of the foreshore was an offence under s. 14; but they have refused to consider that question. If, as is contended, s. 14 overrides the rights of owners of the foreshore, the respondent cannot, by merely asserting that he is the owner of the foreshore, oust the jurisdiction of the justices. The respondent relies on s. 28 of the Act as saving his rights, but s. 14, which is the enacting clause, puts a limitation on the rights of owners of the foreshore, and s. 28 is clearly repugnant to it and cannot be relied on in support of an alleged bona fide claim of right. If the jurisdiction of the justices is ousted, there is no other Court which can adjudicate upon this question, for s. 14 only authorizes the recovery of a penalty, and no action for an injunction or damages or any other relief could be maintained against an owner of the foreshore for a contravention of the provisions of the section.

Manisty, K.C., and *H. Stuart Moore*, for the respondent, were not called upon.

LORD ALVERSTONE C.J. In this case it has been contended by the Attorney-General on behalf of the appellant that it was

(1) (1905) 93 L. T. 17.

the duty of the magistrates, before holding that the respondent had acted under a bona fide claim of right, to consider whether, on the true interpretation of s. 14 of the Harbours Act, 1814, the fact that the person charged with the removal of shingle contrary to the order of the Board of Trade was the owner of the foreshore afforded in law any defence to the charge. I am of opinion that this argument is not sound, and it is important to notice what were the contentions of the respondent before the magistrates. The case states that it was contended on behalf of the respondent that under the indenture of April 8, 1873, the respondent had acted under a bona fide claim of right to property and that the jurisdiction of the justices was ousted. That indenture was a conveyance by the Crown to the respondent of the part of the foreshore from which the shingle in question was removed. The Attorney-General says that that contention amounts to no more than an assertion that the respondent is the owner of the foreshore, but in my judgment it may have another very important bearing on the case, namely, as to whether the respondent, standing in the position of the Crown by virtue of this conveyance, may not be entitled to claim the rights and privileges reserved by s. 28 of the Act, especially when one finds that the very next contention raised by the respondent in the case is that his rights as owner of the foreshore were protected by s. 28, and that no order made under s. 14 could affect such rights. It was also contended for the respondent that the justices were bound to inquire whether it was necessary for the protection of the port of Sunderland to prohibit the taking or removing of shingle from the shores of the sea. It is not necessary for us to decide that question, and as we have not heard counsel for the respondent upon the point, I think it is better not to express any opinion upon it. It was contended for the appellant that no bona fide claim of right could arise, and that it was the duty of the magistrates to hear and determine the case under the statute.

If the claim of the respondent was one which could not exist in law, or as to which there could be no legal right on the part of the respondent, there is ample authority to shew that the contention of the appellant would have been a good

1909

BURTON v. HUDSON.

Lord Alverstone C.J.

answer to the respondent's claim of right, and the magistrates would have been bound to have dealt with the case. It is therefore necessary to consider whether the claim of right put forward by the respondent falls within either of those categories. The position is this. The appellant, on behalf of the Crown, alleges that under s. 14 of the Harbours Act, 1814, he is entitled to stop the digging and removal of shingle from that part of the foreshore which is defined in the order of the Board of Trade of June 30, 1908. The respondent says he has a conveyance made in 1873 by the Crown to him of the Crown rights in that part of the foreshore. In these circumstances it seems to me that, in order to allow this appeal, we should have to say that a claim of this sort cannot be bona fide set up, on the ground that the Act of 1814 has by s. 14 absolutely prohibited the owners of any foreshore, or of any Crown rights in the foreshore, from digging or removing shingle if the Board of Trade forbids them to do so. That raises a very important and a very difficult question of law. I express no opinion as to whether the respondent's contention is right or wrong, but I am satisfied that it is impossible to say that it is not, and cannot be, a bona fide claim of right. It is not suggested that the respondent s claim is not in fact made bona fide; on the contrary it is clearly put forward as a genuine and substantial claim, for, as soon as the Board of Trade order was published, the respondent's solicitors wrote to the Board asking that proceedings might be instituted in order that the question of the validity of the order might be tested. In my opinion, if we were to hold that the jurisdiction of the justices was not ousted in this case, we should be departing from the recognized principle which has been acted on for years in this Court; as was said by Blackburn J. in one case (1), "The general rule of law applicable to justices exercising summary jurisdiction is that they are not to convict where a real question as to the right of property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal."

It has been strenuously argued by the Attorney-General that, if the justices have no jurisdiction to deal with this case, the

(1) *Reg.* v. *Stimpson*, (1863) 4 B. & S. 301, at p. 309.

appellant has no other remedy. I am wholly unconvinced as to that. I believe that the Attorney-General, or the Government department acting through or on the relation of the Attorney-General, could obtain from the Court a declaration as to the validity of the Board of Trade order, and could, if necessary, apply for an injunction to restrain any taking of the soil from the foreshore contrary to that order. I am satisfied that there are many instances of similar declarations being made, but it seems to me that, if it was intended to deprive the subject of the ordinary right of having this kind of difficult question determined by the proper tribunal, different words would be required, words which have been inserted in more than one statute where it was intended to give magistrates power of dealing with a case, notwithstanding that a claim of right has been asserted. I think that the decision of the magistrates was quite right and that this appeal should be dismissed.

GRANTHAM J. I am of the same opinion. We have to consider this question under the well-known principle of law, that where property or title is in question the jurisdiction of the magistrate is ousted, the reason being that it is thought that a matter of so much importance should not be decided by magistrates at petty sessions or by any Court of summary jurisdiction. The question therefore is whether or not in this case property or title is in question. I do not see how any one can really doubt it, having regard to the fact that the claim made by the respondent was made prior to the proceedings before the magistrates. As soon as the publication of the order of the Board of Trade was brought to the respondent's notice, he, through his solicitor, gave notice to the Board of Trade stating that he was the owner of the foreshore within the area named and asking the Board of Trade to institute proceedings in order that the question of the validity of the order might be tested. That being so, every step has been taken by the respondent to shew that his claim was bona fide and that it was a claim of title. It was said by Lush J. in the case of *Watkins* v. *Smith* (1) that if there is any evidence of a legal right which a judge might leave to a jury, the justices

(1) (1878) 26 W. R. 692.

1909

BURTON v. HUDSON.

Grantham J.

should hold their hands; and even if the matter is doubtful it is enough to stay their jurisdiction. It is only where the justices can see that the claim is not a claim which can have any legal foundation, or is one which is not made bona fide, that their jurisdiction is not ousted. I asked the Attorney-General to give an instance where, under this particular statute, an owner in the position of the respondent has been fined for taking shingle, and he could not give such an instance. It also seems to me that the respondent has only to refer the magistrates to s. 28 to shew that their jurisdiction is ousted. In my opinion the matter was decided quite rightly, and I think this appeal should be dismissed.

JELF J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondent: *Downing & Handcock, for Bolam, Sunderland.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 12, 13;
June 14.

DEAN AND ANOTHER *v.* BROWN.

County Court—Practice—New Trial—Jurisdiction of Judge to grant New Trial—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

The power to grant new trials conferred upon the judges of county courts by s. 93 of the County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but is subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court.

Murtagh v. *Barry*, (1890) 24 Q. B. D. 632, approved and followed.

So *held* by Lord Alverstone C.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting).

APPEAL of the defendant from the decision of a Divisional Court reversing an order of the judge of the Manchester County Court whereby he granted a new trial in a case heard by him without a jury.

The action was brought by an infant plaintiff, suing by her father as next friend, to recover damages for an assault alleged to have been committed by the defendant, a schoolmaster, by striking the plaintiff on the back and pushing her across the room during school hours. The judge, who described the case as one of considerable difficulty, found that the defendant had assaulted the plaintiff by pushing her across the room, and gave judgment in the plaintiff's favour for 12*l.* damages and costs. Subsequently the defendant applied to the county court judge for a new trial (1) upon affidavits which alleged (inter alia) that on the day after the alleged assault the plaintiff's mother had been seen in the act of assaulting the plaintiff; the evidence had only been discovered since the trial, and the defendant said that it

(1) By 51 & 52 Vict. c. 43 (the County Courts Act, 1888), s. 93, "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties; but the Court shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given entitling either the plaintiff or defendant to judgment. The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

C. A. 1909

DEAN v. BROWN.

could not have been discovered by the exercise of reasonable diligence before the trial. The learned judge granted a new trial upon terms as to costs, and the plaintiff appealed. The Divisional Court (Darling and Jelf JJ.) held that they were bound by *Murtagh* v. *Barry* (1) and allowed the appeal. The defendant appealed by leave of the Court of Appeal.

R. J. Neville (*H. Lynn* with him), for the defendant. The Divisional Court conceived themselves to be bound by *Young* v. *Kershaw* (2) to hold that the county court judge had no jurisdiction to grant a new trial on the ground of the discovery of fresh evidence which could not with reasonable diligence have been discovered before the trial, unless that evidence was so conclusive as to make it practically certain that the verdict would be different if the evidence were adduced. But that was a High Court case, and the limitations as to the grounds for granting new trials which are imposed upon the Supreme Court have not been imposed by statute and ought not to be imposed by judicial decision upon the judges of the county courts. The strictness of the rule laid down in that case was greatly mitigated by the decision in *Birch* v. *Birch* (3), where it was said that the fresh evidence must be such as to raise a reasonable probability of success. The discretion to be exercised by a county court judge in granting or refusing a new trial is of course a judicial discretion, and if he has applied the right rule of law in considering whether it should be granted, no appeal lies from his decision : *How* v. *London and North Western Railway.* (4)

E. E. Wild, for the plaintiffs. The county court judge misdirected himself in point of law when granting the new trial. The power of a county court judge to grant a new trial given by s. 93 of the County Courts Act, 1888, is not an absolute power to be exercised by him on any grounds which he may think fit, but is subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court: *Murtagh* v. *Barry.* (1) That decision has governed the practice for nearly twenty years and should be

(1) 24 Q. B. D. 632.
(2) (1899) 81 L. T. 531.
(3) [1902] P. 130.
(4) [1892] 1 Q. B. 391.

followed. In that case the application for a new trial was on the ground that the verdict was against the weight of the evidence, and Lord Coleridge C.J. said in his judgment, "A county court judge is bound by the rules of law which are laid down in and acted upon by this Court; the judges of the High Court cannot grant a new trial merely because they are dissatisfied with the verdict; the authorities upon that point are binding upon us and also upon the inferior tribunals subject to our control." The same principle applies where the ground of the application is the discovery of fresh evidence since the trial, and the result is that under the rule laid down in *Young* v. *Kershaw* (1), in order to justify the granting of a new trial, the fresh evidence must be such as to be practically conclusive of the result. That case followed *Anderson* v. *Titmas* (2), in which case Cleasby B. said: "Where fresh evidence has been discovered after the trial, a party may have his case tried a second time; but to entitle him to that privilege I think that the fresh evidence proposed to be adduced should be conclusive." There is no reason why a county court judge should have wider powers as to granting a new trial than the judges of the Court of Appeal, and the proper interpretation of s. 93 of the Act of 1888 is that, upon the hearing of an application for a new trial, a county court judge must exercise a judicial discretion, subject to the same limitations as are imposed upon judges of the High Court. [He also cited *Thurtell* v. *Beaumont* (3); *Broadhead* v. *Marshall* (4); Chitty's Archbold's Practice, 14th ed., vol. 1, 741.]

R. J. Neville, in reply, cited *Dovaston* v. *De la Bertauche* (5); *Pole* v. *Bright*. (6)

Cur. adv. vult.

June 14. LORD ALVERSTONE C.J. read the following judgment:—This is an appeal from a decision of Darling and Jelf JJ., sitting in the Divisional Court, reversing a judgment of his Honour Judge Parry, who on an application made to him ordered a new trial in an action tried before him. The action was one of assault by a schoolmaster upon a pupil, and the

(1) 81 L. T. 531.
(2) (1877) 36 L. T. 711.
(3) (1823) 1 Bing. 339.
(4) (1774) 2 W. Bl. 955.
(5) (1901) 17 Times L. R. 547.
(6) [1892] 1 Q. B. 603.

C. A. 1909

DEAN v. BROWN.

Lord Alverstone C.J.

learned county court judge gave judgment for the plaintiff for the sum of 12*l.* He ordered a new trial on the grounds stated in a certain affidavit, that some evidence of witnesses had been discovered which raised a doubt as to the correctness of his decision. It was not disputed that the facts stated in the affidavits would not justify a new trial being ordered, if the principles are to be applied which the High Court of Justice have acted upon in applications for a new trial, as laid down by the Court of Appeal in the case of *Young* v. *Kershaw* (1), and on this ground the Divisional Court, following the decision in *Murtagh* v. *Barry* (2), reversed the decision of the county court judge.

In *Murtagh* v. *Barry* (2) the action had been tried in a county court with a jury, and the learned judge who tried the case, being dissatisfied with the verdict, ordered a new trial upon that ground, and also, as stated by him, on the ground that he had a general discretion to allow a new trial under s. 93 of the County Courts Act, 1888. It was contended before us that *Murtagh* v. *Barry* (2) was wrongly decided, and that, at any rate in a case tried before a judge alone, the county court judge had a greater power to order a new trial, in fact a general discretion to order a new trial in any case which he thought just. If the matter were res integra, there would, I think, be a good deal to be said for giving a county court judge—at any rate in a case tried before himself alone—a wider discretion as to ordering a new trial than exists in the Supreme Court; but in my opinion the decision in *Murtagh* v. *Barry* (2) upon the facts of that particular case was clearly right, and I think it quite impossible to contend that the learned county court judge has an absolute discretion to order a new trial and is not fettered by any of the rules upon which the Court of Appeal would act in a similar case. In delivering the judgment of the Court in *Murtagh* v. *Barry* (2) Lord Coleridge C.J. and Mathew J. held that "when a county court judge claims not to be bound by rules as to the granting of new trials which are binding upon the High Court, the Court of Appeal, and the House of Lords, but claims a right to set

(1) 81 L. T. 531. (2) 24 Q. B. D. 632.

aside the verdict of a jury toties quoties upon the simple ground that he does not like the verdict, he is taking up a position which cannot be supported in law. A county court judge is bound by the rules of law which are laid down in, and acted upon by, this Court." The decision in that case has been acted upon for over eighteen years, and the practice in all the county courts in England has proceeded in accordance with it, and it would in my judgment be wrong for this Court to alter such a long-established practice. The matter is one which, if it be thought right to make a change, should be dealt with by legislation. There is, moreover, the further difficulty of laying down limits to the discretion exercised by the county court judge in such a case, if the practice of the High Court is not to be followed. For these reasons I am of opinion that we ought to dismiss the appeal and to confirm the judgment of the Divisional Court.

FLETCHER MOULTON L.J. read the following judgment:— This is an appeal to the High Court from an order made by the judge of the Manchester County Court granting a new trial in a case heard before him without a jury. The application was supported by affidavits setting forth additional relevant evidence obtained since the trial which the applicant contended could not with reasonable diligence have been obtained previously. Affidavits in answer were filed on behalf of the respondents and considered by the judge, who, stating that the case at the original trial had been one of great doubt, especially on a critical issue to which the new evidence related, and that the case involved a serious matter of character, granted a new trial upon somewhat severe terms. The respondents, who were the plaintiffs in the action, appealed to the Divisional Court to set aside the order on the ground that the new evidence was not conclusive, and therefore would not have been considered adequate to justify the granting of a new trial in a case brought in the superior Court according to the decision of the Court of Appeal in *Young* v. *Kershaw* (1), and that by the decision in *Murtagh* v. *Barry* (2) a Divisional Court had established that

(1) 81 L. T. 531. (2) 24 Q. B. D. 632.

C. A. 1909

DEAN v. BROWN.

Fletcher Moulton L.J.

the same rules of practice as to the granting of new trials which are binding upon the High Court are binding upon a county court judge. From this decision the appellant has appealed by leave of this Court, and the important question for our decision is whether the jurisdiction of a county court judge to grant a new trial is limited to those cases in which the superior Court would grant a new trial in a case tried in the superior Court.

In the view that I take of this case it would be difficult to exaggerate the importance of the question. Although to a certain extent under the control of the Supreme Court, the county courts of England practically form an independent judicial system which provides the only Courts accessible to the vast majority of the nation in civil disputes, and in these Courts the vast majority of civil actions are tried. The costliness of the procedure in the Supreme Court practically forbids its being used for cases involving sums which are small to the wealthy but of great importance to the poorer classes, and hence the procedure and jurisdiction of the county courts are matters of great importance and have in late years been carefully regulated by statutes passed from time to time, all of which (so far as anything involved in the present case is concerned) are embodied in the consolidating and amending Act, entitled the County Courts Act, 1888. By s. 93 of that Act it is provided as follows: "The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings." The decision of the Divisional Court in the present case, following the decision in *Murtagh* v. *Barry* (1), would substitute for the words "if he shall think just" the words "in such cases and upon such grounds as the High Court of Justice would grant a new trial in cases tried in that Court." I cannot accept such a gloss upon the statute. To my mind it is inconsistent both with the language and the intention of the statute.

To form a just opinion in this matter it is necessary to consider for a moment the origin and development of the procedure

(1) 24 Q. B. D. 632.

of the Supreme Court and the county courts respectively. The Supreme Courts, as being from time immemorial the High Courts of the realm, have been to a great extent a law unto themselves. The origin of their procedure is largely lost in the mists of the past, but in its main outlines this procedure was self-evolved and rested ultimately partly on tradition and partly on an inherent right to control its own procedure so as best to do justice between the parties which the Court claimed and to which it gave effect in its judgments. As is natural, the importance of the procedure being fixed and known, so that justice might be done in an orderly and recognized fashion, tended to give ever increasing authority to the customary procedure of the Courts, and the deviations from it by direct appeals to this inherent power of the Court became rarer, though they have never entirely ceased. In this way a well recognized procedure became well nigh as much a part of the law administered by those Courts as though it had been statutory. From time to time that procedure was amended by statutes, such, for example, as the Common Law Procedure Act, 1854, and finally it was to a great extent revolutionized by the Judicature Acts, and it is now regulated by a detailed code of rules made under the provisions of those Acts, none of which apply to county courts. Without absolutely taking away the inherent power of the Court, this elaborate code of procedure has made it still less frequently necessary to appeal thereto, and substantially the whole of the proceedings in the superior Courts are under and in accordance with such rules.

The changes which have thus been made by statute in the procedure of the superior Courts represent the growth of public opinion with regard to the requisites of an acceptable legal procedure. In no respect is this growth more striking than in the recognition of the necessity of giving an effective appeal from the decisions of the Courts of first instance. Under the old procedure the power of appeal was comparatively limited. Now there is a right of appeal both on fact and law from all final judgments (subject to proper recognition of the functions of the jury as a tribunal to decide facts), and the Court on the hearing of such an appeal may give leave to adduce fresh evidence, and at the conclusion may direct judgment to be entered for one of the

C. A. 1909

DEAN v. BROWN.

Fletcher Moulton L.J.

parties or may order a new trial. This appellate jurisdiction is vested in the Court of Appeal, which is a distinct Court, and there is no longer any appellate jurisdiction in the judges of the Courts of first instance in cases tried in the High Court.

Meanwhile the code of procedure in the county courts has also been elaborated. But in this case we have to deal with an inferior Court, which according to the common law could to a great extent be controlled in its proceedings by the superior Courts, and, therefore, had little or no power of self-development. Accordingly the present procedure in county courts is entirely the creation of statute, and, so far as the questions in this case are concerned, is to be found in the provisions of the County Courts Act, 1888, and the rules made thereunder. It is widely different from the procedure in the superior Courts. The necessities of the case have led the Legislature to restrict the guarantees against possible judicial error in view of the more practical advantage of rendering the procedure simple, speedy, and cheap. It is not necessary for me to point out examples of this simplification, because that with which we have here to do is the most striking of all, namely, the restricted right of appeal. The relevant part of s. 120, which is the section which deals with appeals, reads as follows: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision or order of the judge may appeal from the same to the High Court." Inasmuch as the procedure is wholly statutory, it would follow that there is no appeal whatever from the county court on questions of fact. Lest, however, there should be any doubt on the point, s. 93 provides expressly as follows: "Every judgment and order of the Court, except as in this Act provided, shall be final and conclusive between the parties." But although the Legislature has thus made the county court itself the final tribunal in questions of fact, it has not entirely neglected to provide securities against mistakes or shortcomings in the conduct or result of the trials which are the means by which such questions are decided between the parties. The section by which it is thus provided that there shall be no

general right of appeal goes on to provide as follows: "The judge shall also in every case whatever have the power, if he shall think just, to order a new trial to be had upon such terms as he shall think reasonable, and in the meantime to stay the proceedings."

The language of this provision is wide, and I see no reason to doubt that it was intentionally comprehensive and emphatic. It provides at best but an imperfect substitute for the right of free appeal to a different Court in matters of fact, but it is so much simpler and cheaper that it is doubtless of far more value to the general body of litigants in county courts than would be a more elaborate system. But this is beside the point. The main fact is that it is a special jurisdiction given by statute. It is neither transplanted nor derivative. It is created by the section, and therefore its scope and restrictions must be ascertained from the language of the section itself and not otherwise, and the duty of the Court is merely to construe that language. I cannot think that this is a very formidable task. I see no difficulty in giving to the words of this section their natural meaning. Thus construed, it gives to the judge the power of granting a new trial whenever he considers that the interests of justice require it. It is of course a judicial discretion, and must not be used for illegitimate purposes or on illegitimate grounds. To do so would be misconduct on the part of the judge, and there are ample safeguards against such occurrences in the inherent powers of the superior Courts. But one thing is clear. The power is to be exercised "if he shall think just." Our duty is to construe those words, and it is to my mind impossible to construe them as introducing the particular limitations and restrictions which, under a wholly different judicial system, a superior Court has in its wisdom chosen to impose upon itself in granting the particular remedy of a new trial. They do not represent the interpretation by the Supreme Court of a statutory jurisdiction given to it in like language, for no such enactment and no such jurisdiction exist. Nor do they represent principles of abstract justice which are equally binding on all tribunals. This is exemplified by the fact that the Court of Chancery, in the case of issues sent by it to be tried by a jury, exercised the jurisdiction of directing a

C. A. 1909

DEAN v. BROWN.

Fletcher Moulton L.J.

new trial according to wholly different principles to those obtaining at the same date in the Courts of Common Law: *Swinfen* v. *Swinfen*. (1) They are of the nature of practical rules of conduct which the Court has adopted because, on the whole, it has considered that in its particular scheme of procedure with its own provision of alternative remedies they represent the wisest course to steer between the rival evils of treating mistakes as irreparable on the one hand and weakening the finality of trials on the other. The judge of the county court is exercising a different jurisdiction of different origin in a widely different scheme of judicial procedure, and as a matter of law there is no reason why he should impose on himself like restrictions and limitations, nor can I see any good ground why he should do so. I am therefore of opinion that the case of *Murtagh* v. *Barry* (2) was wrongly decided and ought not to be followed by us.

I have said that in my opinion the rule laid down in *Murtagh* v. *Barry* (2) is not justified by the language of the statute. But to my mind it is also unmeaning. Take the present case. The trial was before a judge alone. What practice is there in the superior Courts which corresponds to an application to the Court itself for a new trial in such a case? No judge of a superior Court has jurisdiction to grant a new trial in a case so heard before himself, and therefore there is nothing to give rise to any practice or rules of practice applicable to such a case, and none such exist. It is therefore unmeaning to say that the judges of county courts must follow the rules adopted by the Supreme Court to guide its action in corresponding cases, for there are none.

The origin of the difficulty is, that the Court in deciding *Murtagh* v. *Barry* (2) forgot that its real duty was to construe the language of a section of a statute giving a special jurisdiction to judges of county courts with regard to the granting of new trials. They seem to have thought that it was their business to guide and restrict the exercise of this jurisdiction. The Supreme Court has no such controlling or directing power. The county court judges derive their jurisdiction from this statute, and they are entitled to exercise it as therein provided. We are not

(1) (1859) 27 Beav. 148. (2) 24 Q. B. D. 632.

entitled to impose upon it limitations dictated by our own notions of prudence or desirability. By the statute the county court judge is empowered to grant a new trial "if he shall think just," and not "if the Supreme Court think it just." He has to act to some degree as a Court of review from himself. For example, applications are frequently made to us on appeal from a judgment which are based upon some misapprehension of the effect or meaning of evidence on the part of the judge which has led him to come to a wrong conclusion, or rendered the trial unsatisfactory, and in such cases we have full jurisdiction to grant a new trial where we consider that justice demands it. This jurisdiction is in the county courts clearly vested by s. 93 in the judge himself. But there is nothing in the language of that section to limit the jurisdiction to this particular case, and I see no reason for doubting that he has as ample a power of correcting possible miscarriages of justice (so far as they can be corrected by granting a new trial) as have been granted to the Court of Appeal in relation to the decisions of the Supreme Court, and even wider powers, for the language is clear and strong. To my mind there is nothing extraordinary in the grant of such a jurisdiction. In other judicial systems (as for instance in some of the United States of America) there are, I believe, like powers even in the case of the superior Courts, and rehearings before the same judge are a regular feature in interlocutory matters in our Chancery Courts. No doubt the discretion to grant a new trial is a judicial discretion. It is only to be exercised if the judge shall think it just, and one of the elements of such a judicial discretion is that due regard shall be had to the importance of finality in the decisions of Courts. It must not be exercised capriciously or from improper motives. In this respect it is in the same position as all other cases of judicial discretion. But, apart from these necessary and implied restrictions, it is a discretion which is full and complete, and from its exercise there can be no appeal, for such exercise is not a matter of law or equity within the provisions of s. 120, and therefore there is by virtue of s. 93 no appeal.

It may be that the Court who decided *Murtagh* v. *Barry* (1)

(1) 24 Q. B. D. 632.

C. A. 1909

DEAN v. BROWN.

Fletcher Moulton L.J.

thought that they were dealing with a case in which the judge had not purported to exercise a judicial discretion in granting a new trial, but had done so confessedly at his mere will and pleasure. He stated in his notes that a new trial was granted "upon the ground mentioned in the application"—i.e., that the verdict was against the weight of evidence—"and also under the absolute power to grant a new trial given to judges of county courts by s. 93 of the County Courts Act, 1888." The Court may have thought that the second ground was an assertion of the right to grant a new trial capriciously and not in the exercise of his judicial discretion upon the circumstances of the case, and therefore treated it as an act of misconduct in the judge which rendered the order a nullity. Otherwise the decision is most difficult to understand, because the new trial is specifically stated to be granted on the ground that the verdict was against the weight of evidence, and this was incontestably a proper ground for the exercise of the judge's discretion, and was a matter not subject to the review of the superior Court. But whether this be the explanation of the decision or not, the dicta in the judgment of Lord Coleridge C.J. in that case are to my mind incorrect in law for the reasons that I have given. In the present case no question of misconduct can arise at all. The learned judge was entitled to allow the defendant to put in the affidavit in support of the application, and to consider the probable effect of the suggested fresh evidence. He was entitled to take into consideration the fact that the matter was not a trivial one affecting some small question of quantum (in which case he might rightly decline to exercise the jurisdiction), but involved a serious question of character. So far from there being any sign here of the assertion of a right capriciously to grant a new trial, the words of the learned judge indicate that he acted after careful consideration of the circumstances of the case and under a full sense of his judicial responsibility.

Finally it was pressed upon us that the decision in *Murtagh* v. *Barry* (1) was given twenty years ago, and that we ought on that account not to disturb the law there laid down. There

(1) 24 Q. B. D. 632.

is, in my opinion, no room for such considerations here. The statute we have to construe is not obsolete, but, on the contrary, is in the fullest and most continuous operation, and in such a case I am not prepared to admit that anything short of a decision which is binding upon it justifies a Court doing otherwise than loyally interpreting the language of the statute to the best of its ability and applying it accordingly. We are here to see that the public have the full benefit of that which the Legislature has enacted, and I cannot admit the existence of any conflicting duty. But if there be cases where the Court is justified in leaning towards not interfering with decisions of old standing, such cases are of a wholly different type to the present case. If under such a decision properties have changed hands and titles have been accepted without question for a long series of years, or if under its sanction some commercial practice has grown up and become established, a Court will do what it rightly may to avoid the evil and confusion of a change, and may perhaps in its decisions allow itself to be influenced by such considerations if there be an ambiguity which permits the recognized interpretation, even though it would be the less acceptable interpretation were the matter res integra. But the present case is not of that type. If the decision in *Murtagh* v. *Barry* (1) is erroneous, the county courts have for twenty years been deprived of a jurisdiction which the Legislature intended and still intends that they should have, and our plain duty is to put them at once in the enjoyment of it. Our decision will disturb no titles, will create no confusion. What has been done in the past will remain undisturbed; only the future will be affected, and this by restoring the procedure which the statute provides. In such a matter an erroneous decision acquires no sanction from age.

For these reasons I am of opinion that the learned judge of the county court in making the order for a new trial was acting within the jurisdiction given by the statute, and that his decision was not open to review by the High Court. This appeal ought therefore to be allowed with costs here and in the Divisional Court.

(1) 24 Q. B. D. 632.

C. A. 1909

DEAN v. BROWN.

FARWELL L.J. read the following judgment:—The first question for determination in this case is the construction of the words in s. 93 of the County Courts Act, 1888, "The judge shall also in every case whatever have the power, if he shall think just, to order a new trial," &c. The words "in every case" mean, in my opinion, whether the action shall have been tried with a jury or by a judge alone; the present discussion turns on the words "if he shall think just." It was held by the Divisional Court in *Murtagh* v. *Barry* (1) that a county court judge in granting a new trial is bound by the rules and principles binding the judges of the High Court and of the Court of Appeal in granting new trials. We are asked to overrule this case, or to distinguish it on the ground that there had there been a trial by jury; but in my opinion it was rightly decided and is not distinguishable on any satisfactory ground. The only alternative is to hold that each of the numerous county court judges has a free hand and can do as he pleases. But this would lead to chaos: the difficulty of exercising such a jurisdiction without any rules to guide the judge is very great, and I cannot bring myself to hold that the Act intended new trials to depend on the idiosyncrasy of each individual judge, unguided and unfettered by any principle or rule, and so to inaugurate a system really open to the reproach unjustifiably brought against equity by Selden, that it depended on the measure of each Chancellor's foot.

When Acts give judges powers to use "if they think just," the justice meant is not that elusive and indefinable concept called "abstract justice," but is justice in accordance with established principles and rules known to and applied by the Courts, or, as Sir Joseph Jekyll puts it in *Cowper* v. *Cowper* (2), "Though proceedings in equity are said to be secundum discretionem boni viri, yet when it is asked, Vir bonus est quis? the answer is, Qui consulta patrum, qui leges juraque, servat." Accordingly, when under 21 & 22 Vict. c. 27 Wood V.-C. tried a question of fact before himself without a jury, and there was a motion for a new trial, Lord Chelmsford said that, in dealing with the finding of the Vice-Chancellor on the question of fact,

(1) 24 Q. B. D. 632. (2) (1734) 2 P. Wms. 720, at p. 753.

he regarded himself as placed precisely in the situation of the judges of the Courts of common law when a rule is obtained to set aside the verdict of a jury: *Penn* v. *Bibby*. (1) So, too, Lord Davey in *Harris* v. *Beauchamp* (2) says of the wider phrase "just or convenient" in s. 25 of the Judicature Act, 1873, that it does not confer an arbitrary or unregulated discretion on the Court, or authorize the Court to invent new modes of enforcing judgments in substitution for the ordinary modes.

Then it is argued that the High Court rules and principles ought not to be applied in the case because a county court action is not in the same position as a High Court action, inasmuch as there is no appeal from a finding of fact by a county court judge (s. 93), and there is such an appeal from the High Court judge. But this absence of appeal was intended to limit litigation in matters of the character usually brought in the county courts, and to my mind affords no ground whatever for giving the county court judge an unlimited power to grant a new trial: on the contrary, the refusal of any right to appeal on fact is founded on the principle "Interest reipublicæ ut sit finis litium": the unlimited power to grant a new trial would be in contravention of it. I am therefore of opinion that the county court judge is bound to act on the same principles as other Courts in granting new trials. Those principles have been laid down by this Court in *Young* v. *Kershaw* (3) in accordance with earlier authorities and are binding on us. In the present case the county court judge has disregarded those principles and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial—and that is clearly not enough—which shew nothing in the nature of surprise, fraud, or conspiracy, and which also state nothing to shew that the information alleged could not with reasonable diligence have been obtained at the first trial. The real ground that influenced the learned judge appears to have been that he came to his former conclusion of fact with hesitation, and that the matter was serious for the defendant in consequence of his position. Neither of these grounds is, in my opinion, sufficient. I

(1) (1866) L. R. 2 Ch. 127. (2) [1894] 1 Q. B. 801, at p. 809.
(3) 81 L. T. 531.

C. A. 1909

DEAN v. BROWN.

therefore agree with the Divisional Court and think that this appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Baker & Nairne, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendant: *Sharpe, Pritchard & Co., for William Walker, Manchester.*

W. J. B.

1909 *June* 8, 9.

J. LYONS & CO., LIMITED *v.* THE MAYOR, &c., OF LONDON.

London—Removal of Refuse—Restaurant—House or Trade Refuse—Public Health (London) Act, 1891 (54 & 55 *Vict.* c. 76), *ss.* 30, 33, 141.

The refuse of a restaurant, consisting of ashes, clinkers, coffee grounds, egg shells, dust and general dirt, broken crockery, tea leaves, parings and scrapings, &c., is house refuse within the meaning of s. 30 of the Public Health (London) Act, 1891, which the sanitary authority is bound to remove without payment.

Westminster Corporation v. *Gordon Hotels, Ld.*, [1906] 2 K. B. 39, applied.

CASE stated by an alderman of the city of London.

An information was preferred by J. Lyons & Co., Limited, the appellants, against the Corporation of London, the respondents, for that the latter being the sanitary authority for the city of London did unlawfully fail without reasonable cause to comply with s. 30 of the Public Health (London) Act, 1891 (1), in this

(1) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 30:

"(1.) It shall be the duty of every sanitary authority—

"(*a*) To secure the due removal at proper periods of house refuse from premises, and the due cleansing out and emptying at proper periods of ashpits, and of earth closets, privies, and cesspools (if any), in their district, and the giving of sufficient notice of the times appointed for such removal, cleansing out, and emptying, and

"(*b*) Where the house refuse is not removed from any premises in the district at the ordinary period, or any ashpit, earth closet, privy, or cesspool in or under any building in the district is

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

respect, namely, that the house refuse not having been removed from the premises No. 31, Poultry, in the said city, at the ordinary period, and the appellants, the occupiers of the said premises, having on October 29, 1908, served upon the respondents a written notice requiring the removal of such refuse, the respondents did not comply with the notice within forty-eight hours after service thereof.

The information was heard on November 25, 1908, by the alderman, who dismissed the summons, but at the request of the appellants stated this case.

At the hearing of the information the following facts were admitted or proved. The respondents were and are the sanitary authority for the city of London within the meaning of the Public Health (London) Act, 1891. The appellants were a limited company and the occupiers of a shop on the ground floor together with the basement and back portion of the first floor of No. 31, Poultry, in the city of London, but of no other part thereof. The appellants used the premises so occupied by them as a tea shop, where, with a view to making a profit, they provided customers with refreshments and food, namely, tea, cold meat, bread, eggs, butter, cakes, and vegetables, which were consumed on the premises. Some of the food was cooked or prepared on the premises and some was not. Cabbages were

---

not cleansed out or emptied at the ordinary period, and the occupier of the premises serves on the authority a written notice requiring the removal of such refuse, or the cleansing out and emptying of the ashpit, earth closet, privy, or cesspool, as the case may be, to comply with such notice within forty-eight hours after that service, exclusive of Sundays and public holidays.

"(2.) If a sanitary authority fail without reasonable cause to comply with this section, they shall be liable to a fine not exceeding twenty pounds."

Sect. 141: "In this Act, unless the context otherwise requires,—. . . ., The expression 'house refuse' means ashes, cinders, breeze, rubbish, night soil, and filth, but does not include 'trade refuse':

"The expression 'trade refuse' means the refuse of any trade, manufacture, or business, or of any building materials:

"The expression 'street refuse' means dust, dirt, rubbish, mud, road scrapings, ice, snow, and filth: . . . ."

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

not supplied to customers, but were supplied to the staff. No person slept on the premises at night.

On or about October 29, 1908, the respondents failed to remove certain refuse from the premises, and on that date they were served by the appellants with a written notice requiring its removal. The respondents failed to comply with the notice within forty-eight hours after service thereof.

The refuse in respect of which the notice was served consisted of the following items:—Ashes and clinkers, coffee grounds, a little newspaper, about six cabbage leaves, egg shells, dust and general dirt, a little broken crockery, tea leaves, potato parings, scrapings from the sink, and sweepings from rooms, but did not include scraps left by customers, which were otherwise disposed of by being given away in charity.

The refuse amounted to less than four bushels, and between one-half and two-thirds of the bulk was general sweepings and ashes. The refuse was unsorted; it had been collected from the premises and was contained in four skips which had been sealed up.

It was contended on behalf of the appellants that the refuse of the appellants' premises, the constituents of which are specified above, was house refuse and not trade refuse; that in determining the question whether refuse is house refuse or trade refuse regard is to be had to the nature and character of the refuse; and that it is immaterial how the refuse, if it is of the nature and character of house refuse, originated.

A witness, one Dr. A. B. Blyth, a public analyst and lately medical officer of health to the borough of Marylebone, was called by the appellants to give evidence as to whether the refuse in question was of the same character as that found ordinarily in a dwelling-house; but the alderman excluded the evidence and that of other witnesses to the same effect. The attention of the alderman was called to *Westminster Corporation* v. *Gordon Hotels, Ld.* (1), and it was submitted by counsel for the appellants that a restaurant was nothing more than the dining-room of an hotel.

(1) [1906] 2 K. B. 39, affirmed on another point in the Court of Appeal, [1907] 1 K. B. 910, and in the House of Lords, [1908] A. C. 142.

The alderman was of opinion on the above facts that the appellants' premises were not a house within the meaning of the judgments in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1), and that the refuse in question was not house refuse within the meaning of the Public Health (London) Act, 1891, and he therefore dismissed the information.

The question for the opinion of the Court was whether the alderman on the above statement of facts came to a correct determination in point of law.

Danckwerts, K.C., Bethune, and *Daldy,* for the appellants. This is house refuse. The expressions "house refuse" and "trade refuse" have each acquired a special technical meaning; and this is due to the way in which certain sections of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which have been repealed by the Public Health (London) Act, 1891, were worded. By s. 128 of the Act of 1855 different considerations applied to the removal of "the refuse of any trade, manufacture, or business, or of any building materials," from those applying to the removal of dirt, ashes, rubbish, ice, snow, and filth. It was decided in *Vestry of St. Martin's* v. *Gordon* (2) that the words "refuse of any trade, manufacture, or business" did not mean soil, dirt, ashes, rubbish, &c., caused by any trade, manufacture, or business, and that they were not equivalent to any refuse the result of any trade, manufacture, or business. That case, which was a decision of the Court of Appeal, really covers the present, because the words "refuse of any trade, manufacture, or business, or of any building materials" are the words defining "trade refuse" in s. 141 of the Public Health (London) Act, 1891. Trade refuse therefore does not mean refuse the result of any trade, manufacture, or business, or dirt, ashes, rubbish, &c., caused by any trade, manufacture, or business. But unless it means that, the respondents must fail, for on no other ground could the refuse in the present case be called trade refuse. The decision in *Vestry of St. Martin's* v. *Gordon* (2) was followed in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1), and it was there pointed out that in determining whether refuse is house refuse

(1) [1906] 2 K. B. 39. (2) [1891] 1 Q. B. 61.

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

or trade refuse regard is to be had rather to its nature than to its origin or the manner in which it is produced. The refuse in the present case is of the same nature as that produced in any dwelling-house. The use to which an article is applied rather than the character of the premises in which it is consumed determines the question whether it is supplied for domestic or for trade purposes: *Frederick* v. *Bognor Water Co.* (1) In the present case the food, &c., of which this refuse is the residue was clearly supplied for and applied to household purposes none the less because the trade of the appellants consists in applying food to household purposes.

Macmorran, K.C., and *H. Courthope-Munroe*, for the respondents. This case arises not under the Metropolis Management Act, 1855, but under s. 141, the definition section, of the Public Health (London) Act, 1891; and decisions on the former Act are no authority for the construction of the latter. The earlier Act did not distinguish between house refuse and trade refuse; the later Act does. The clear and broad principle which separates the one from the other is this: that which is produced in a dwelling-house is house refuse; that which is produced in the course of a trade or business is trade refuse. Thus clinkers and ashes may be trade refuse though they are usually produced in a dwelling-house: *Gay* v. *Cadby* (2); *London and Provincial Laundry Co.* v. *Willesden Local Board* (3); *Vestry of St. Margaret's* v. *Queen Anne Mansions Co.* (4) According to the argument for the appellants, ashes from an iron foundry would be house refuse.

[JELF J. The quantity produced might be an important matter.]

In a tawed leather manufactory large quantities of eggs are used, but it could hardly be contended that the egg shells from such a manufactory would be house refuse. The case of *Westminster Corporation* v. *Gordon Hotels, Ld.* (5) is distinguishable, because there the Court treated the hotel in question as an aggregation of dwelling-houses. The principle of that decision

(1) (1908) 78 L. J. (Ch.) 40.
(2) (1877) 2 C. P. D. 391.
(3) [1892] 2 Q. B. 271.
(4) (1893) 57 J. P. 277.
(5) [1906] 2 K. B. 39.

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

was that refuse, which if produced in one house would unquestionably be house refuse, did not lose that character because it was produced in many houses instead of in one house. With regard to *Vestry of St. Martin's* v. *Gordon* (1), that case is no authority in the present case, because there the question was not whether the subject-matter of the decision was house refuse or trade refuse, but whether it was "refuse of a trade, manufacture, or business" on the one hand, or "dirt, ashes, rubbish, ice, snow, or filth" on the other hand; and as the fact was that it consisted of clinkers, it was held to come under the description of "ashes," notwithstanding that those ashes were produced in the furnaces of certain boilers situate in the basement of an hotel and used to generate steam for lighting, heating, cooking, &c. The substance came within the express terms of the section dealing with ashes, and so there was an end of the discussion. That case is no authority for the position that the clinkers were house refuse. The classification, house refuse, did not exist in s. 125 of the Metropolis Management Act, 1855; instead of a classification, that section contained an enumeration of different specified things, of which "ashes" was one, and the only question was whether the clinkers were "ashes" eo nomine.

Danckwerts, K.C., in reply. There is no real distinction between an hotel and a restaurant. A restaurant only consists of the dining-room, sitting-room, and kitchen of a dwelling-house. Therefore this case is in principle covered by *Westminster Corporation* v. *Gordon Hotels, Ld.* (2)

LORD ALVERSTONE C.J. I regret myself that the course which the Court of Appeal and the House of Lords were induced to take in *Westminster Corporation* v. *Gordon Hotels, Ld.* (3) has deprived us of the assistance we should have had from the further consideration of the questions raised in this case. A further consideration would have been desirable because the principle for which Mr. Macmorran has contended, namely, that refuse of whatever description produced solely in the course of carrying on a trade is "trade refuse" within the meaning of this

(1) [1891] 1 Q. B. 61.
(2) [1906] 2 K. B. 39.
(3) [1906] 2 K. B. 39; [1907] 1 K. B. 910; [1908] A. C. 142.

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

Lord Alverstone C.J.

enactment, though not approved of in the case of *Vestry of St. Martin's* v. *Gordon* (1), was recognized almost to its full extent in *Gay* v. *Cadby* (2), and possibly also in *London and Provincial Laundry Co.* v. *Willesden Local Board* (3) and *Vestry of St. Margaret's* v. *Queen Anne Mansions Co.* (4) But as the authorities stand it is impossible for us in this Court to adopt that principle.

It not unfrequently happens that a case put hypothetically during the argument in a case comes up subsequently for decision. The present is a case in point. If I may quote my own words in *Westminster Corporation* v. *Gordon Hotels, Ld.* (5), I said there: "It is, as I have said, difficult to draw the line, and I am not at all sure on which side of the line an ordinary restaurant would fall; by which term I mean a restaurant in which no one resides, but to which people simply come in considerable numbers to take their meals in the middle of the day or in the evening, the business producing a considerable quantity of refuse." I had in my mind the possibility that on consideration by a higher tribunal the principle might find favour that the distinction is between that which is produced in a place of business by a business and that which is produced in a house in the course of living therein. But the argument in this case has satisfied us that we must hold this to be house refuse, and that this appeal must be allowed.

If the magistrate had decided this matter as a conclusion of fact upon the evidence, we could not have interfered with his finding; but he has not done so. He has shewn clearly what he meant by the words "the said refuse is not house refuse within the meaning of the Act," and it is quite plain that in his view, unless the place where the refuse came into existence is a house in the ordinary sense, the principle of *Westminster Corporation* v. *Gordon Hotels, Ld.* (6) does not apply, and that his finding that the refuse was not house refuse was only a consequence of his finding that the restaurant was not a house. But that involves the misdirection in point of law that house

(1) [1891] 1 Q. B. 61.
(2) 2 C. P. D. 391.
(3) [1892] 2 Q. B. 271.
(4) 57 J. P. 277.
(5) [1906] 2 K. B. 39, at p. 48.
(6) [1906] 2 K. B. 39.

refuse can only be produced in a house; and so the reasoning from which he draws his conclusion fails.

Now for all practical purposes the refuse in this case is the same as that in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1) If we could adopt the principle that everything produced in a trade was trade refuse, we should have a clear and safe guide to the decision of these cases; but, having regard to the judgment of the Court of Appeal in *Vestry of St. Martin's* v. *Gordon* (2) and to the decision of this Court in *Westminster Corporation* v. *Gordon Hotels, Ld.* (1), we cannot adopt that principle. The refuse in the last-named case, which, as I have said, was practically identical with the refuse in the present case, was produced in an hotel, a place of business; and I do not think we ought to draw the fine distinction suggested in the argument between a restaurant, which consists only of a dining-room and kitchen, and an hotel, which consists of dining-rooms, kitchen, and bedrooms, for the purpose of making refuse produced in the former trade refuse, while that produced in the latter is house refuse, when in each case the refuse is of the kind produced in any ordinary house.

Mr. Macmorran then contended that ss. 30 and 141 of the Public Health (London) Act, 1891, were not a mere re-enactment of the corresponding sections of the Metropolis Management Act, 1855, but were intended to have a different effect, and that, therefore, as the case of *Vestry of St. Martin's* v. *Gordon* (2) was a decision under the earlier Act, that decision need not hamper us in construing s. 141 of the later Act. But when the corresponding sections of the Metropolis Management Act, 1855, are considered, ss. 125 to 127 on the one hand and s. 128 on the other, it will be seen that that Act did practically draw the same and no other distinction between house refuse and trade refuse as is drawn by the Public Health (London) Act, 1891. By ss. 125 to 127 the vestry were enabled to employ people to remove dirt, ashes, rubbish, ice, snow, and filth; the occupier could not refuse to allow them to remove soil, dirt, ashes, or filth; and the dirt, soil, ashes, and rubbish became the property of the vestry, with power to dispose of it. Sect. 128 applied in

(1) [1906] 2 K. B. 39. (2) [1891] 1 Q. B. 61.

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

Lord Alverstone C.J.

case any scavenger should be required by the owner or occupier of any house or land to remove "the refuse of any trade, manufacture, or business, or of any building materials." It is true that these sections contain no definition of house refuse or trade refuse; but the articles specified in them have been reproduced in s. 141, the interpretation section of the Public Health (London) Act, 1891, under the headings "house refuse" and "trade refuse" respectively. In that section the expression "house refuse" means ashes, cinders, breeze, rubbish, night soil, and filth, but does not include trade refuse; that is to say, the later legislation has adopted the grouping in ss. 125 to 127 of the earlier Act. Then the expression "trade refuse" means the refuse of any trade, manufacture, or business, or of any building materials, reproducing exactly the words of s. 128 of the Act of 1855. Therefore ss. 125 to 127 of that Act dealt with house refuse and s. 128 with trade refuse. But if that be so, the main ground of Mr. Macmorran's argument is cut from under his feet. His second ground of distinction, namely, that in *Vestry of St. Martin's* v. *Gordon* (1) the Court were dealing with ashes specifically named, must fall with the first, because in *Westminster Corporation* v. *Gordon Hotels, Ld.* (2) this Court held that the words "ashes, cinders, breeze, rubbish, night soil, and filth" in the expression "house refuse" were wide enough to include the refuse in that case, which is practically identical with the refuse in the present case. In face of that decision we cannot distinguish *Vestry of St. Martin's* v. *Gordon* (1) on the ground that there the Court was dealing with ashes and not with "house refuse" eo nomine.

To recur once more to the authorities, I still think that there is a broad distinction between *Gay* v. *Cadby* (3) and *London and Provincial Laundry Co.* v. *Willesden Local Board* (4) on the one hand and *Vestry of St. Martin's* v. *Gordon* (1) on the other hand, because in *Gay* v. *Cadby* (3) and *London and Provincial Laundry Co.* v. *Willesden Local Board* (4) the article was produced solely for the purpose of carrying on a particular kind of trade. But I do not think I ought to give effect to that distinction unless I am

(1) [1891] 1 Q. B. 61.
(2) [1906] 2 K. B. 39.
(3) 2 C. P. D. 391.
(4) [1892] 2 Q. B. 271.

prepared to go the whole length indicated by Mr. Macmorran and to say that any house refuse produced in a trade, e.g., the dust in a shop, the ashes in a shop, the refuse from the midday meals of the shopkeeper in a shop which is locked up at night and in which he does not sleep, is trade refuse and not house refuse. But the decisions in the Court of Appeal and in this Court preclude me from going that length. In *Vestry of St. Martin's* v. *Gordon* (1) Lord Esher M.R. declined to say that the dust or ashes from a shop were the refuse of a trade, and expressed his dissent from *Gay* v. *Cadby* (2) if it went the full length of deciding that all refuse produced in the course of a trade was, irrespective of its character, trade refuse. In *Vestry of St. Martin's* v. *Gordon* (3) Lindley L.J. adhered to his opinion in *Gay* v. *Cadby* (2) and clearly thought that case was distinguishable, but Lopes L.J. proposed a definition of trade refuse which would negative the test proposed by Mr. Macmorran. That case was followed in *Westminster Corporation* v. *Gordon Hotels, Ld.* (4), and, while it stands, that decision precludes us from acceding to the main argument on behalf of the respondents. For these reasons I think this appeal must be allowed.

JELF J. I also think that this appeal must be allowed. The question before us is a mixed question of law and fact and raises the difficulty which is constantly arising, namely, where the line is to be drawn. The magistrate has submitted to the Court the facts which he has found and asks for a direction of the Court as to whether he is right in this mixed question of law and fact in coming to the conclusion that the refuse in question was trade refuse and not house refuse. Now there are many cases which clearly fall on one side of the line and many which as clearly fall on the other. For example, in a carpenter's shop the sawdust and shavings are clearly trade refuse ; the snippings from a tailor's business would clearly be trade refuse ; and so would be the hair cut by a hairdresser from the heads of his customers. On the other hand there are certain incidents common to all houses, whether used for trade

(1) [1891] 1 Q. B. 61, at p. 67.
(2) 2 C. P. D. 391.
(3) [1891] 1 Q. B. 61.
(4) [1906] 2 K. B. 39.

1909

J. LYONS & CO., LIMITED v. LONDON CORPORATION.

Jelf J.

purposes or not, which would clearly not be trade refuse—dust blown in by the wind, soot from chimneys, and dirt brought in on the boots of persons entering the house. These fall clearly on the other side of the line. The description of the refuse in this case includes many things which are merely house refuse and other things which might perhaps be considered trade refuse. The question is what was substantially the character of this refuse; and it seems to me that, having regard to its character as distinct from the place in which it was produced, it is not trade refuse, but is house refuse. To a certain extent I think the quantity of a particular kind of refuse produced may be an important factor; crumbs of bread and scraps of food are produced both in a dwelling-house and in a restaurant, in the latter case in much greater quantity than in the former. No one would doubt that those produced in a dwelling-house were house refuse; but in the case of a restaurant they are undoubtedly part of the residual part of the business carried on therein. Here again the rule of common sense must be applied and the substance of the matter regarded, and in the present case, especially after considering the cases to which my Lord has referred, I think the refuse is house refuse and not trade refuse.

SUTTON J. I agree. I think the Act draws a marked distinction between trade refuse and house refuse, first by the definition clause, and secondly by the fact that whatever falls within s. 30 does not fall under s. 33 of the Public Health (London) Act, 1891. As regards trade refuse I think the cases shew clearly that that means the residue of the manufacture and does not include all matters necessary to carry on the manufacture. I can see no difference between the refuse in this case and the sweepings from a lock-up shop, and I think the magistrate has fallen into an error in regarding it as necessary, which he seems to have done, that a person should sleep and reside in the house in order to make the refuse house refuse. I agree that the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Stanley, Woodhouse & Hedderwick.*
Solicitor for respondents: *The City Solicitor.*

W. H. G.

PROVINCIAL MOTOR CAB COMPANY, LIMITED *v.* DUNNING.

1909
June 10.

Motor Car — Conditions of User — Identification Plate—Lamp—Breach of Statutory Regulation—Mens rea — Negligence — Aiding and abetting — Corporation—Locomotives on Highways Act, 1896 (59 & 60 *Vict. c.* 36), *s.* 6—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 7—*Motor Car* (*Registration and Licensing*) *Order*, 1903, *art.* 11.

Article 11 of the Motor Car (Registration and Licensing) Order, 1903, made by the Board of Trade under the Motor Car Acts, 1896 and 1903, provides that whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway a lamp shall be kept burning on the car, so contrived as to illuminate, by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of the motor car.

By s. 7 of the Locomotives on Highways Act, 1896 (which is one of the Motor Car Acts, 1896 and 1903), a breach of any regulation made under that Act may, on summary conviction, be punished as therein provided.

The appellants, a limited company, who were motor cab proprietors, were convicted before a magistrate of aiding and abetting a driver in their service in using a motor cab in contravention of the above regulation on the following facts:—The driver was using a motor cab more than one hour after sunset having a lamp, which was lighted, hanging too low to illuminate the identification plate. The motor cab was fitted with a proper and permanent bracket on which to hang the lamp. The appellants had in their service a foreman who was charged by them with the duty of seeing that the cabs left their premises in such a condition as to comply in all respects with the Motor Car Acts, 1896 and 1903, and the regulations of the Board of Trade made thereunder. The magistrate found that the appellants were careless in not seeing to it that a proper lamp was fixed on the cab:—

Held, that there was evidence on which the appellants might be convicted of aiding and abetting their driver in committing a breach of the above regulation.

Case stated by the stipendiary magistrate for the city of Liverpool.

An information was preferred by Leonard Dunning, head constable of Liverpool (hereinafter called the respondent), under the Motor Car Acts, 1896 and 1903, and orders made under those Acts, and under s. 5 of the Summary Jurisdiction Act, 1848, against the Provincial Motor Cab Company, Limited (hereinafter

1909

PROVINCIAL MOTOR CAB COMPANY, LIMITED, v. DUNNING.

called the appellants), for that they the appellants did aid and abet one John Edward Kynaston to use a certain motor car during the period between one hour after sunset and one hour before sunrise, to wit, at 6.45 P.M. on December 31, 1908, on the public highway in Prince's Avenue, in the city aforesaid, on which car a lamp was not then kept burning so contrived as to illuminate, by means of reflection, transparency, or otherwise, and render easily distinguishable every letter and figure on the identification plate fixed on the back of the said car, contrary to a certain regulation duly made under the afore-mentioned statutes (1), which information was heard and determined by the magistrate at a petty sessions on January 13, 1909.

The magistrate convicted the appellants of the said offence and fined them the sum of twenty shillings with costs.

(1) Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), s. 2: "During the period between one hour after sunset and one hour before sunrise, the person in charge of a light locomotive shall carry attached thereto a lamp so constructed and placed as to exhibit a light in accordance with the regulations to be made by the Local Government Board."

Sect. 6: "(1.) The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used."

Sect. 7: "A breach of any bye-law or regulation made under this Act, or of any provision of this Act, may, on summary conviction, be punished by a fine not exceeding ten pounds."

The Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 7: "(1.) The Local Government Board may, under s. 6 of the Locomotives on Highways Act, 1896 (in this Act referred to as the principal Act), make regulations—

"(*a*) providing generally for facilitating the identification of motor cars, and in particular for determining and regulating generally the size, shape and character of the identifying marks to be fixed under this Act and the mode in which they are to be fixed and to be rendered easily distinguishable, whether by night or by day, ..."

Sect. 20: "(3.) . . . . The Locomotives on Highways Act, 1896, and this Act may be cited together as the Motor Car Acts, 1896 and 1903."

The Motor Car (Registration and Licensing) Order, 1903. Dated November 19, 1903, and numbered 998.

Article 11: "Whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway, a lamp shall be kept burning on the car, so contrived as to illuminate by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of the motor car . . . ."

1909

PROVINCIAL MOTOR CAB COMPANY, LIMITED v. DUNNING.

The appellants, being dissatisfied with the magistrate's determination in point of law, duly applied in writing to the magistrate to state and sign a case for the opinion of the King's Bench Division. This case was accordingly stated.

On the hearing of the information the following facts were admitted or proved:—At 6.45 P.M., more than one hour after sunset, on December 31, 1908, one John Edward Kynaston, a servant of the appellants, was driving a motor cab, the property of the appellants, in Prince's Avenue, Liverpool. The identification plate at the back thereof was not illuminated. The lamp, which was lighted, was hanging too low, and was shewing a light beneath the plate. A proper and permanent bracket was provided on the car on which to hang the lamp. It was the duty of the appellants' foreman to see to it that the cars left their premises in a condition which should comply in all respects with the provisions of the Motor Car Acts, 1896 and 1903, and the regulations of the Board of Trade made thereunder.

The appellants contended that the driver must have taken the lamp from another car; but of this there was no evidence. They also contended that they could not always be responsible for their driver if he took a lamp off another car, and that they had exercised care in sending out their cabs; but beyond this the appellants' solicitor did not in terms contend that there was no evidence that they had not aided and abetted the commission of the offence. The magistrate offered to adjourn the hearing of the information in order that the appellants might call further evidence; this offer was declined by the appellants' solicitor.

The magistrate was of opinion that the matter was one of fact for his decision; that there was carelessness on the part of the appellants in not seeing to it that a proper lamp was fixed on the car in question; and that the appellants were guilty of an offence under the Acts, to wit, of aiding and abetting the said John Edward Kynaston to use a motor car on the highway at 6.45 P.M., the back number whereof was not illuminated as required by art. 11 of the above regulation.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

1909

PROVINCIAL MOTOR CAB COMPANY, LIMITED v. DUNNING.

A. J. Ashton, K.C., and *Cuthbert Smith*, for the appellants. There is no evidence of aiding and abetting. The most that can be laid to the charge of the appellants is negligence in allowing the cab to leave their garage without a sufficient light. But negligent supervision is not aiding and abetting: *Callow* v. *Tillstone*. (1) To constitute aiding and abetting there must be some sort of active proceeding on the part of the accused; he must incite, or procure, or encourage the wrongful act: *Reg.* v. *Taylor* (2); non-interference to prevent a crime is not itself a crime: *Reg.* v. *Coney*. (3) Further, the appellants being a corporation are incapable of aiding and abetting.

Wooll, for the respondent. It was the duty of the appellants to see that cabs leaving their garage were in a condition complying with the Motor Car Acts, 1896 and 1903, and the statutory regulations made under those Acts. If they omit to discharge that duty they commit an offence under those statutes and regulations, whether there be any mens rea or not on their part. In cases where a guilty intention is an essential element in the offence the argument for the appellants has much force; but in an offence like that charged in the present case those on whom lies the statutory duty to prevent the offence from being committed aid and abet its commission if they fail in that duty and allow it to be committed: *Du Cros* v. *Lambourne*. (4)

LORD ALVERSTONE C.J. In my opinion this appeal should be dismissed. It is to be observed that art. 11 of the Motor Car (Registration and Licensing) Order, 1903, made under the Motor Car Acts, 1896 and 1903, was made for the protection of the public. A breach of that regulation is not to be regarded as a criminal offence in the full sense of the word; that is to say, there may be a breach of the regulation without a criminal intent or mens rea. It has been pointed out by this Court more than once that the back light upon a motor car is a very important light, because it is the one means whereby if an accident happens, and the car does not stop, it may be identified. It must be taken in this case that the learned magistrate had

(1) (1900) 83 L. T. 411.
(2) (1875) L. R. 2 C. C. R. 147.
(3) (1882) 51 L. J. (M.C.) 66.
(4) [1907] 1 K. B. 40.

1909

PROVINCIAL MOTOR CAB COMPANY, LIMITED v. DUNNING.

Lord Alverstone C.J.

before him evidence to satisfy him that this car left the garage with the back light in such a position that the identification plate could not be seen. Every opportunity was offered to the appellants to call further evidence, but the offer was declined by their solicitor, who had taken the point that because the appellants were a corporation, and because the only evidence was that which I have indicated, there was no evidence of aiding and abetting in sending out the lamp in the condition in which it was. I think it right to say that if a corporation have a large number of cars and act, as they must act, by agents, and those agents send out the cars in a way which does not comply with the regulations, in my judgment the corporation are responsible for the penalties imposed thereby. The doctrine that there must be a criminal intent does not apply to criminal offences of that particular class which arise only from the breach of a statutory regulation. In my judgment, therefore, there was evidence upon which the learned magistrate could come to the conclusion that this car was sent out by persons, for whom the company was responsible, in a condition which did not conform with the statutory regulation; and, that being so, that there was evidence of the company aiding and abetting the offence.

JELF and SUTTON JJ. concurred.

Appeal dismissed.

Solicitors for appellants: *Collins, Robinson, Driffields & Kusel, Liverpool.*

Solicitors for respondent: *F. Venn & Co., for E. J. Pickmere, Liverpool.*

W. H. G.

C. A.
1909
June 21, 22.

[IN THE COURT OF APPEAL.]

COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Agreement for Sale of Goods—Price to be paid by Instalments at stated Periods—Bond, Covenant, or Instrument of any kind whatsoever—Liability to ad valorem Stamp Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing, not under seal, between the company and a customer, the company agreed to supply to the customer for a period of seven years electric energy for motive power, heating, and lighting purposes on the customer's premises at a fixed charge of 57*l.* 10*s.* per quarter and an additional penny per unit as indicated by meter :—

Held, that the agreement was chargeable with an ad valorem duty of 2*s.* 6*d.* per cent. on the aggregate amount of the minimum quarterly payments for seven years as being a "security" for sums of money at stated periods, under clause 1 of the heading "Bond, Covenant, or Instrument of any kind whatsoever" in Sched. I. to the Stamp Act, 1891.

Decision of Channell J., [1909] 1 K. B. 737, affirmed.

Appeal from a decision of Channell J. (1) on a case stated by the Commissioners of Inland Revenue.

The material portions of the case were as follows :

1. On August 3, 1907, an instrument dated August 1, 1907, was presented on behalf of the County of Durham Electrical Power Distribution Company, Limited (thereinafter referred to as "the appellants"), to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable.

4. By clause 1 of the instrument the appellants were to supply and Snowball, Son & Co., Limited (hereinafter called "the consumers"), were to take, during a term of six years from the date of the instrument, all electric current used for motive power, heating, and lighting requirements on the consumers' premises therein mentioned.

By clauses 3 and 4 the consumers were to pay for all electric current supplied thereunder a fixed charge of 57*l.* 10*s.* per quarter, and in addition 1*d.* per Board of Trade unit for all current

(1) [1909] 1 K. B. 737.

supplied and consumed as indicated by the appellants' meters, and 10*s.* per quarter as a rental for the said meters.

By clause 5 the consumers were to be entitled to a supply of electric current up to the capacity of the existing installation, which was to be deemed equal to 46 kilowatts, and clauses 6 and 7 provided for increase of quarterly payments on increase of capacity of installation, and for reduction of quarterly payments on decrease of capacity of existing installation, with a proviso that in no case should the said fixed charge of 57*l.* 10*s.* be reduced below 50*l.* per quarter.

5. The Commissioners were prepared for the purpose of the case to hold that the instrument was an agreement or memorandum made for, or relating to, the sale of goods, wares, or merchandise within exemption 3 under the head in the schedule to the Stamp Act, 1891, "Agreement or any Memorandum of an Agreement" (1), but also were of opinion as to clauses 3 and 4 thereof that it was an instrument of any kind whatsoever being the only or principal or primary security for sums of money at stated periods for a definite period of seven years, so that duty was payable at the rate of 2*s.* 6*d.* per 100*l.* on the aggregate amount of the minimum annual payments for seven years, and they accordingly assessed it. They so assessed it by reference to the heading "Bond, Covenant, &c.," in Sched I. of the Stamp Act, 1891. (2)

(1) Stamp Act, 1891, Sched. I.:

"Agreement or any Memorandum of an Agreement . . . . under hand only . . . . and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument . . 6*d.*

Exemptions.

(3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise."

(2) "Bond, Covenant, or Instrument of any kind whatsoever.

(1.) Being the only or principal or primary security for any annuity . . . . or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:—

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained . . . . . } The same ad valorem duty as a bond or covenant for such total amount,"

which in the present case would be 2*s.* 6*d.* for every 100*l.*

C. A. 1909

COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY v. INLAND REVENUE COMMISSIONERS.

The appellants, being dissatisfied with the assessment, contending that no ad valorem or other duty was payable in respect of these clauses or the other provisions of the instrument, required the Commissioners to state a case for the opinion of the Court.

Channell J. affirmed the decision of the Commissioners and gave judgment for the Crown.

The company appealed.

Danckwerts, K.C., and *T. J. C. Tomlin*, for the appellants. This agreement is clearly an agreement for the sale of goods; it provides for a sum to be paid for electric energy to be supplied just as gas or water or any other commodity might be supplied: *British Electric Traction Co.* v. *Inland Revenue Commissioners.* (1) It has been long ago decided that a contract for the supply of water was exempt from stamp duty as being a contract for the sale of goods: *West Middlesex Waterworks Co.* v. *Suwerkrop.* (2) For the purposes of stamp duty the instrument must be taxed according to its character, having regard to its leading and principal object—*Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (3)—and this stamp covers everything that is accessory to this object. The principal object of this agreement is the sale of electrical energy, and it is none the less an agreement for the sale of goods because it contains special stipulations in clauses 3 and 4 regarding the mode of payment. Illustrations of this principle are found in *Curry* v. *Edensor* (4), *Smith* v. *Cator* (5), and *Chatfield* v. *Cox.* (6)

Jones v. *Commissioners of Inland Revenue* (7) and *National Telephone Co.* v. *Inland Revenue Commissioners* (8) are distinguishable. In those cases there was no heading in Sched. I. of the Stamp Act, 1891, which exactly applied, and the obligatory part was treated as the leading object.

Where a document comes within each of two categories

(1) [1902] 1 K. B. 441.
(2) (1829) 4 C. & P. 87.
(3) (1872) L. R. 7 Ex. 211, 217.
(4) (1790) 3 T. R. 524.
(5) (1819) 2 B. & A. 778.
(6) (1852) 18 Q. B. 321.
(7) [1895] 1 Q. B. 484.
(8) [1899] 1 Q. B. 250; [1900] A. C. 1.

chargeable with duty, the Crown is only entitled to one of the duties: *Speyer Brothers* v. *Inland Revenue Commissioners.* (1)

Exemption 2, relating to the hire of any labourer or servant, and exemption 4, as to wages of mariners, both provide for agreements that necessarily involve payments at stated periods, and if the decision under appeal is correct, these would all be charged with ad valorem duty and the exemptions would be nugatory. In exemption 3 the words are "for or relating to" the sale of any goods: the words "relating to" are wider than "for." This is clearly an agreement "relating to" the sale of goods, and once you have an agreement whose leading characteristic is the sale of goods, then, even though there are various ancillary clauses, it comes within the exemption, and is not liable to any stamp duty.

Sir S. T. Evans, S.-G., and *W. Finlay*, for the Crown. There is at the end of the schedule to the Stamp Act, 1891, a list of "General exemptions from all stamp duties." That list does not include an agreement for the sale of goods. Such an agreement, therefore, is not exempt from all stamp duties. The specific exemption (3.), so much relied on by the appellants, exempts the agreement only from the sixpenny agreement stamp where that stamp is prima facie applicable, but the heading "Agreement or any Memorandum of Agreement" has no application to an agreement which is "otherwise specifically charged with any duty," and this agreement is "otherwise specifically charged" with the duty imposed on "Bond, covenant, or instrument of any kind whatsoever . . . . being the principal security . . . . for any sum or sums of money at stated periods . . . . for a definite and certain period." That such an instrument is "a security" within the meaning of that clause is clear from *Jones* v. *Commissioners of Inland Revenue* (2) and *National Telephone Co.* v. *Inland Revenue Commissioners.* (3)

[They were stopped.]

COZENS-HARDY M.R. This is an appeal from the decision of Channell J. which raises a question whether the agreement

(1) [1908] A. C. 92.
(2) [1895] 1 Q. B. 484.
(3) [1899] 1 Q. B. 250; [1900] A. C. 1.

C. A. 1909

COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY v. INLAND REVENUE COMMISSIONERS.

Cozens-Hardy M.R.

entered into between the Durham Electrical Power Distribution Company and one of their customers is or is not liable to pay stamp duty under Sched. I. to the Stamp Act, 1891.

We have heard a very interesting, learned, and elaborate argument from Mr. Danckwerts and his junior as to the meaning and effect to be given to that heading of Sched. I. which deals with "agreements," and, by way of exception from it, by clause 3 exempts an agreement "for or relating to the sale of goods." This case has been argued on the assumption that electrical energy is to be considered goods, wares, or merchandise for the purposes of this clause, and we are dealing with it on that footing, but it must not be taken that we have either assented to or dissented from that proposition, which may some day require careful consideration. Having listened to that argument, it seems to me that the Solicitor-General has given a short and very sufficient answer to it.

Now the heading in Sched. I. which taxes agreements has certain exemptions from it. The exemption (3.) of an agreement "for or relating to the sale of goods, wares, or merchandise" can have no operation in the case of an instrument hit by the other taxing clauses. When one looks at that heading as to agreements one sees that it only applies to an agreement under hand "not otherwise specifically charged with any duty," and when we ask, Is this an agreement otherwise specifically charged with duty? we are referred to the heading "Bond, Covenant, or Instrument of any kind whatsoever, being the only or principal or primary security . . . . for any sum or sums of money at stated periods." Now it has been held by authority which binds us, namely, *National Telephone Co.* v. *Inland Revenue Commissioners* (1), that that word "security" for any sum of money does not involve a collateral security for an obligation created aliunde, but it applies to a case in which the instrument itself is that which creates the obligation to pay. When I look at this agreement it seems to me impossible to deny that it is within the language of this heading and within the decisions as to "security" for sums of money payable at stated periods.

Let me go shortly through the agreement. It is an agreement

(1) [1899] 1 Q. B. 250; [1900] A. C. 1.

by which the company are to supply, and the consumers are to take, during the term of seven years, all electrical energy which they may require, and the consumers are to pay to the company for all current supplied a fixed charge of 57*l.* 10*s.* per quarter —that is irrespective of the amount of current that they take— and, in addition, the sum of a penny per Board of Trade unit for all current supplied and consumed as indicated by the company's meters; and they are also to pay 10*s.* per quarter as rent for the meters. There are further provisions, which I need not discuss, which provide for the payment of an additional fixed sum per quarter, and, in certain cases, there is a provision reducing the fixed sum per quarter. Having read that, is it possible to doubt that that instrument is a "security" for a sum or sums of money at stated periods? I am of opinion that that question can only be answered in one way, and, that being so, we have nothing to do with the "agreement under hand," and nothing to do with the exemptions from that heading on the ground that this is or might be said to be an agreement for the sale of goods, wares, or merchandise. I am not myself alarmed by the idea that the decision in this case may be said to interfere with ordinary mercantile contracts for the sale of goods payable by instalments. However, that is not the present case. This is a case which seems to me to be within the second heading of the schedule to which I have referred, and not in any way affected by the exemption to the first heading.

In my view the judgment of Channell J. is quite right, and this appeal should be dismissed with costs.

FARWELL L.J. I agree.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitors: *King, Wigg, Robertson & Brightman, for Watson, Burton & Corder, Newcastle-upon-Tyne; Solicitor of Inland Revenue.*

W. C. D.

1909

Jan. 14.

BAILEY *v.* BARSBY.

Bread—Sale of otherwise than by weight—"Fancy Bread"—Bread Act, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 4.

To constitute bread "fancy bread" within the proviso to s. 4 of the Bread Act, 1836, it is not necessary that it should be superior in quality to ordinary household bread; it is enough that it is so different in size and appearance as not to be liable to be mistaken for it.

Case stated by justices.

An information was laid against the respondent under s. 4 of the Bread Act, 1836 (1), charging him with having sold a loaf of bread otherwise than by weight, the loaf not being such bread as is usually sold under the denomination of French or fancy bread.

At the hearing the following facts were proved.

P. B. Smith, a sergeant of police, gave evidence as follows: "On June 26 last I visited the shop of the respondent at West Street in Bourne, and asked for a small loaf, pointing to two in the window. Mrs. Barsby, the wife of the respondent, who was in the shop, said to me 'A penny one?' I said 'Yes.' She supplied me with the loaf produced, for which I paid one penny. I said to Mrs. Barsby 'What does this loaf weigh?' She replied 'I do not know. We sell them as penny loaves.' The respondent then came into the shop. I said to him 'What does this loaf weigh?' He said 'I do not know. We guess at them and sell them for a penny.' I said 'You are to sell bread by weight.' He said 'Not those loaves; I never have done. I remember the time when I

(1) By s. 4 of the Bread Act, 1836, "From and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight; and in case any baker or seller of bread beyond the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding 40*s*. . . . .: provided that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same." The limits aforesaid are the city of London and the liberties thereof, the weekly bills of mortality, and ten miles from the Royal Exchange.

1909

BAILEY v. BARSBY.

did not sell half that size for a penny.' I afterwards weighed the loaf and found it weighed 10½ oz."

The respondent stated that he had made loaves similar to the one in question for forty years and had regular customers taking twenty or more a day; that the penny loaves sold, being in a fancy shape, took more making than ordinary loaves, and were fancy loaves. He stated that he varied the size of the penny loaf according to the price of flour, the price of the loaf remaining constant at one penny, whereas an ordinary half-quartern loaf varied in price according to the price of flour, but not in weight.

On the part of the appellant it was contended that the bread purchased was ordinary bread, and could not under any circumstances be brought under the category of French or fancy bread or rolls.

On the part of the respondent it was contended that it was impossible for the public to be deceived by the loaf in question, as it only weighed 10½ oz., whereas the ordinary half-quartern loaf weighed 2 lb. at least, and generally 2 lb. 2 oz. to 2 lb. 4 oz. The attention of the justices was called to the judgments of Cave and Wills JJ. in *V. V. Bread Co.* v. *Stubbs*. (1) It was contended that in selling the loaf in question the respondent sold it as fancy bread, and that in the absence of any particular shape known to the trade as "fancy bread" the principle laid down by Cave and Wills JJ. in the above case should apply, namely, that in size, shape, and appearance the loaf must differ from the ordinary half-quartern loaf. The loaf sold by the respondent complied with that principle. The respondent distinguished the *V. V. Bread Case* (1) from the case of *London County Council* v. *Read* (2), where the defendant was charged with selling an ordinary cottage loaf for twopence similar in shape and appearance to those which are usually sold as 2 lb. loaves. In that case any one not well acquainted with the intricacies of the trade might be under the impression that in buying one of these twopenny loaves he was buying an ordinary half-quartern loaf. The loaf sold by the respondent was 4½ inches high and six inches thick in its widest part and weighed 10½ oz.,

(1) (1896) 74 L. T. 704. (2) (1899) 81 L. T. 452.

1909

BAILEY v. BARSBY.

so that it was quite clear to the eye that it was not an ordinary half-quartern loaf.

The justices formed the following opinion:

(*a*) That the penny loaf produced was not similar in size and appearance to the ordinary half-quartern loaf used in household consumption, but was distinctly different from and not liable to be confounded with any ordinary household loaf usually sold by weight.

(*b*) No evidence was given that the respondent was asked to weigh the loaf in question.

(*c*) The making and sale of bread of the size, shape, and quantity of the loaf in question is a great convenience to the public, and it entails extra labour in the making.

(*d*) The style of bread in question had been made by the respondent for forty years and sold during the whole term of the appellant's residence in Bourne without any objection being made.

(*e*) The justices were unanimous in considering the loaf in question to be a small fancy loaf or roll, and they accordingly dismissed the information.

Stuart Bevan, for the appellant. Unless the bread which is the subject of the sale differs from the ordinary household loaf in shape, size, and quality, it is not fancy bread and cannot lawfully be sold otherwise than by weight. It is not enough that it should differ in one of those respects without the others. The case of *V. V. Bread Co.* v. *Stubbs* (1) is an authority that if the size, shape, and appearance are the same mere difference in quality will not suffice. On the other hand the judgment of Lush J. in *Reg.* v. *Wood* (2) shews that it is essential that the bread should be superior in quality. He points out that the reason why fancy bread was excepted from the obligation as to sale by weight was that it was an article of luxury. But the mere baking of ordinary bread in fancy shapes does not make it a luxury.

No counsel appeared on the other side.

(1) 74 L. T. 704.

(2) (1869) L. R. 4 Q. B. 559.

1909

BAILEY v. BARSBY.

LORD ALVERSTONE C.J. I regret that this case has been argued only on one side. In my opinion we ought not to interfere with the justices' decision. They have held that this particular loaf was fancy bread within the meaning of the Bread Act, 1836. Whether it was so or not is a question of fact, and it can only be contended that the finding was wrong if there was no evidence on which they could have so found. The loaf in question was so much smaller, and so different in appearance as well as size, as to be incapable of being mistaken for an ordinary household loaf of the kind usually sold by weight. Mr. Bevan says that to constitute fancy bread it must differ from household bread in quality as well as in size and shape. It has been already held in *V. V. Bread Co.* v. *Stubbs* (1) that mere difference in the quality of the materials of which the bread is made will not suffice if the size and shape remain the same. But I cannot think that the converse proposition is true. Cave J. laid down a proposition which is directly inconsistent with the present contention. He said: "If you want to sell it as fancy bread make it in fancy bread shape, or at any rate, if there is no shape that can be called fancy bread shape, make it in a shape which is different in appearance from the half-quartern loaf, so that no one when he buys it will be under the impression that he is getting an ordinary half-quartern household loaf. As long as you do that you will be right." I agree that when you look at the judgment of Lush J. in *Reg.* v. *Wood* (2) there is more warrant for the contention that fancy bread must be bread of an exceptional quality. But I do not think we ought to regard that case as having decided as matter of law that a loaf, which from its size and shape cannot be mistaken for ordinary household bread, may not be treated as fancy bread merely because it is not of a higher quality. It does not decide that ordinary bread made up in fanciful shapes may not be sold otherwise than by weight. The appeal must be dismissed.

BIGHAM J. I agree. I think this case comes within the proviso of s. 4. It seems to me that the proper test whether bread is fancy bread or not is that laid down by Wills J. in

(1) 74 L. T. 704. (2) L. R. 4 Q. B. 559.

1909

BAILEY v. BARSBY.

Bigham J.

V. V. Bread Co. v. *Stubbs* (1): "In order to make it fancy bread the bread in question must be something which to the eye is so distinct from ordinary household bread that it is not liable to be confounded with it by those who did not know the intricacies of the trade." What are the facts here? It is found that the loaf was not similar in size or appearance to the ordinary half-quartern loaf used in household consumption. It clearly was fancy bread according to the above test.

WALTON J. I am of the same opinion. The contention of the appellant is that bread cannot be fancy bread within the proviso to s. 4 of the Bread Act unless its quality is superior to that of ordinary bread. I do not think that the authorities support that view.

Appeal dismissed.

Solicitors for appellant: *McKenna & Co., for T. Norton, Grantham.*

J. F. C.

1909

June 17.

THE KING *v.* THOMPSON.

Justices—Summary Jurisdiction—Summons—Appearance of Defendant by Counsel—Warrant to compel Personal Attendance of Defendant—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43).

Where in answer to a summons issued by a Court of summary jurisdiction the defendant has appeared by counsel there is no obligation upon him to appear personally, and the justices have no jurisdiction to compel his personal appearance by warrant.

RULES for a certiorari to bring up a warrant of justices to be quashed, and for prohibition.

Lionel Walker Birch Martin was summoned before the justices of Richmond for having unlawfully driven a motor car on a highway at a speed exceeding twenty miles an hour, contrary to the provisions of s. 9 of the Motor Car Act, 1903. At the hearing the defendant appeared by counsel, but was not personally present in the Court. The justices having heard the evidence

(1) 74 L. T. 704.

1909

REX v. THOMPSON.

decided to convict, and it became necessary to consider what penalty should be imposed. By s. 9 of the said Act a person who is convicted of exceeding the speed limit is liable to a penalty not exceeding 10*l.* for the first offence, 20*l.* for the second, and 50*l.* for the third or any subsequent offence, and by s. 4, if he has been twice so previously convicted, he is liable to have his licence indorsed and suspended and to be disqualified from obtaining a further licence. The solicitor who appeared for the prosecution stated that he was prepared to prove three previous convictions against the defendant in other police courts for exceeding the speed limit, and had witnesses present who would have been able to identify the defendant as the person so convicted on those three occasions had he been in Court. The defendant's counsel having refused to give an undertaking that the defendant should attend the Court for that purpose, the justices issued a warrant for the defendant's arrest. The warrant was in the Form No. 6 in the schedule to the Summary Jurisdiction Rules, 1886, and alleged that the defendant was duly served with the summons but did not appear.

A rule having been obtained for a certiorari to bring up the warrant as having been made without jurisdiction, and also a rule for prohibition—

Macmorran, K.C., and *Boyd*, for the justices, and *Bodkin*, for the Commissioners of Police, shewed cause. There was jurisdiction to issue the warrant. Previously to the passing of the Summary Jurisdiction Act, 1848, all defendants in summary proceedings had to be present in Court at the hearing, and the Act of 1848 makes no difference in this respect. Except so far as the justices may dispense with the defendant's presence where he is represented by counsel or solicitor, he still has to attend personally. It is true that by s. 12 the defendant to an information or complaint is to "be admitted to make his full answer and defence thereto by counsel or attorney on his behalf." But that does not get rid of his obligation to appear personally, for those were the very words of the 6 & 7 Will. 4, c. 114, which first gave a right to persons indicted for felonies (s. 1), or prosecuted summarily (s. 2), to be represented by counsel, and as clearly that

1909

REX v. THOMPSON.

representation does not relieve the defendant of the necessity of personally appearing where he is tried on an indictment for a felony, neither can it do so on a summary proceeding. Under s. 2 of the Act of 1848 the justices may issue their warrant if the defendant served with a summons shall not "be and appear" before them at the time mentioned in the summons. The conjunction of those two words points to a personal appearance, as also does the language of s. 13, which repeats the authority of the justices to issue a warrant if at the day and place appointed the defendant "shall not appear when called." The other side will rely on the last paragraph in that section, "but if both parties appear either personally or by their respective counsel or attorneys before the justice or justices who are to hear and determine such complaint or information, then the justice or justices shall proceed to hear and determine the same." But those words cannot be read as enlarging the extent of the representation by counsel or attorney given by s. 12. They must mean that where the defendant is so represented, "and the justices excuse his personal attendance," they shall proceed to hear the case. The word "appear" is used in two senses in the Act. By s. 16 it is provided that the justices may adjourn the hearing and in the meantime may commit the defendant to such safe custody as they think fit, and they may do so none the less because he is represented by counsel or attorney. It is true that the justices here did not act under that section, but it shews that the fact of the defendant's representation does not limit the justices' power of issuing a warrant. It is a matter of frequent occurrence in practice for the magistrate to adjourn a case for the attendance of the defendant. The only authority that there is upon this question is a dictum of Lord Campbell in *Bessell* v. *Wilson* (1) which is opposed to the present contention. But that dictum was unnecessary to the decision.

Danckwerts, K.C., and *Lord Tiverton*, in support of the rules, were not called upon.

LORD ALVERSTONE C.J. The question which we have to decide in this case is whether or not upon the hearing of an information

(1) (1853) 1 E. & B. 489.

1909

REX v. THOMPSON.

Lord Alverstone C.J.

a warrant may be issued by the justices to compel the attendance of the defendant upon the ground that unless he is present in the Court the prosecution cannot prove all that they desire to prove for the purpose of securing his punishment in a particular way. Whether or not they have that power depends upon the provisions of the Summary Jurisdiction Act, 1848, and it becomes necessary to examine in some detail the sections of that Act. Sect. 1 provides for the issue and service of the summons. Then by s. 2, if the person served does not appear the justices may issue their warrant for his apprehension, but the section goes on to provide that upon such information being laid the justices may, if they think fit, instead of issuing their summons, issue in the first instance his or their warrant for apprehending the person against whom such information shall have been laid. That latter procedure was not adopted in this case—that is to say, the warrant was not issued in the first instance—and I only desire to say that I express no opinion as to the circumstances under which the justices would properly issue a warrant in lieu of a summons. There are many cases in which it would be proper to do so, for instance if they were satisfied that in the event of a summons being issued the man would probably abscond. On the other hand there are cases in which it would be most oppressive to issue a warrant in the first instance, for instance if they were to do so on the mere suggestion that the prosecution would have a difficulty in proving their case if a summons were issued. That question, however, does not arise here, as that procedure was not followed. But at the end of the section there is a passage, which was relied upon by the counsel opposing the rule, to the effect that, if the defendant shall fail to appear in obedience to the summons and it be proved that the summons was duly served upon him, "it shall be lawful for such justice or justices of the peace to proceed ex parte to the hearing of such information or complaint, and to adjudicate thereon, as fully and effectually to all intents and purposes as if such party had personally appeared before him or them in obedience to the said summons." It was suggested that that implies that there must in all cases be a personal appearance by the defendant, even though he may be represented by counsel, unless such personal appearance is

1909

REX v. THOMPSON.

Lord Alverstone C.J.

expressly waived by the justices; and it was said that in the absence of such waiver, if the defendant appears by counsel and does not appear personally, any hearing of the case by the justices, though counsel for the defendant is present, is ex parte. I cannot take that view. The meaning of ex parte proceedings was perfectly well understood in 1848, and I cannot think it was intended that if the defendant's counsel and witnesses are present the justices may disregard them and proceed to hear the case as if they were not there merely because the defendant is not personally present. Sect. 12 provides that "the party against whom such complaint is made or information laid shall be admitted to make his full answer and defence thereto and have the witnesses examined and cross-examined by counsel or attorney on his behalf." In my opinion those words are to be read as meaning that the defendant is entitled to be represented by counsel or attorney for the purpose of making his answer and defence as well as for the purpose of the examination and cross-examination of witnesses. Sect. 13 provides for what is to be done on the one hand if the defendant fails to appear, or on the other if the defendant appears and the prosecutor does not; and at the end of the section appear these words: "But if both parties appear either personally or by their respective counsel or attorneys before the justice or justices who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same." Mr. Bodkin has asked us to read that as meaning that if the defendant appears by counsel or attorney the justices are to proceed to hear the case only if they have waived his personal appearance. In my judgment it is impossible to read the words in that restricted sense. If that had been the intention of the Legislature the language would have been much more explicit. But we are not without authority on the subject. In *Bessell* v. *Wilson* (1) this very question was distinctly raised. The action was against an alderman for trespass in causing the plaintiff to be arrested under a warrant issued by the defendant in default of appearance. The plaintiff alleged that the warrant was issued without jurisdiction, as he had in fact appeared by attorney. It

(1) 1 E. & B. 489.

1909

REX v. THOMPSON.

Lord Alverstone C.J.

was argued by Mr. Hugh Hill and Mr. Willes on behalf of the defendant that that appearance was inoperative, that there could be no appearance by attorney at common law, and that, though the statute 6 & 7 Will. 4, c. 114, s. 2, established the right of parties charged to have the assistance of counsel and attorney, that did not dispense with personal appearance. That is the very argument that has been addressed to us to-day. Lord Campbell in giving judgment said: "It cannot be justly said that the party did not appear according to the exigency of the summons . . . . At the time and place appointed by the summons the plaintiff did appear by his counsel and attorney, and his counsel earnestly pressed that he might be heard to shew cause, ... but the alderman refused to hear him because the party was not personally present. We think that in so refusing the alderman was wrong in point of law. The legitimate object of the summons did not render necessary the personal appearance of the party; and that object might be better answered if he appeared by his counsel and attorney." Later on he says: "It is unnecessary to consider the general law respecting the occasions when a party in the course of legal proceedings is privileged to appear by attorney or counsel, as the Legislature has plainly intimated that upon such an occasion as that which we are considering an appearance by counsel or attorney is sufficient. The statute 11 & 12 Vict. c. 43, which is in pari materia with c. 44, not only by s. 12 allows on the hearing of informations and complaints that the parties may plead by counsel and attorney, but by s. 13, which specifies what is to be done if at the return of the summons when the complaint is to be heard the complainant or the defendant do not appear, goes on to say 'But if both parties appear either personally'"—then the next words are italicized—"'*or by their respective counsel or attorneys* before the justice or justices who are to hear and determine such complaint or information, then the said justice or justices shall proceed to hear and determine the same.'" That is a distinct decision by the Court of Queen's Bench in a considered judgment, given as far back as 1853, in accordance with the contention now urged on behalf of the defendant that where he is represented by counsel he need not appear personally, and I think we ought not to

1909

REX v. THOMPSON.

Lord Alverstone C.J.

question the correctness of a decision which has remained unchallenged for so many years. I express no opinion as to what a magistrate ought to do if he adjourns a case for the defendant's attendance, or how far he is justified in drawing inferences adverse to the defendant in the event of his failing to attend. That is not the question that we have to consider. The case that we have to deal with is whether a warrant can be issued for the purpose of enabling the prosecution to prove that which they suggest they cannot prove without the presence of the defendant. I can find no justification for the issue of a warrant for that purpose. I think, therefore, that the warrant in this case was issued without jurisdiction, and that the rules to quash it and to prohibit further proceedings upon it must be made absolute. I wish it to be understood that I am not expressing any opinion as to how the justices should deal with the case on the merits when it comes again before them.

JELF J. I am of the same opinion. It appears that these proceedings were commenced by summons. The justices did not adopt the alternative course provided by s. 2 of issuing a warrant in the first instance in lieu of a summons, and it is extremely doubtful whether they would have been legally justified in issuing a warrant in the first instance for the particular purpose for which the warrant was here issued. However, that question does not arise, as that power was not acted upon. Then with regard to s. 13 it seems clear that there was no power to issue this warrant under that section unless there had been a failure by the defendant to appear in answer to the summons, and that was not the case here, for he had appeared by counsel, and the section expressly provides for an appearance by counsel or attorney. What the prosecution wanted was to supplement their evidence by getting into Court the body of the defendant, as a sort of exhibit, to enable their witnesses to identify him as the person who had been convicted on previous occasions. I can find nothing in the statute which allows a warrant to be issued for such a purpose. It is true that by s. 16 the justices may adjourn the hearing of the information "and in the meantime . . . . may suffer the defendant to go at large or may commit him to the common

gaol . . . . or to such other safe custody as the . . . . justices shall think fit . . . . or may discharge such defendant upon his entering into a recognizance . . . . conditioned for his appearance at the time and place to which such hearing . . . . shall be adjourned." But that does not give them the power claimed here, for the section presumably is designed only to ensure the defendant's appearance on the adjourned hearing, just as the warrant under s. 13 is designed to secure his appearance at the original hearing, and if he appears by counsel it has no application. There is no power to subpœna a defendant to an information as a witness, for it is contrary to the law that he should be compelled to give evidence against his will; and I can find no power to serve him with process in the nature of a subpœna duces tecum to bring his body into Court for the purpose of inspection. It requires very plain language to justify the taking away of a man's liberty, and I can see nothing in the Act justifying such action under the circumstances of this case. I agree that the rules should be made absolute.

A. T. LAWRENCE J. I am of the same opinion. I think that this warrant was not authorized by any of the sections in the Act of 1848. It was really issued in aid of the prosecution, to assist them in proving their case, and it is not proper for the justices to take the part of one side rather than of the other. The issue of a warrant is a judicial act and must be done for some legitimate purpose, and I do not think that such a purpose existed here. The Act provides two methods of procedure, each intended to be applied to the appropriate case, and when the justice thinks that a summons is the appropriate procedure he ought to proceed by summons; when he thinks a warrant is the appropriate procedure he may proceed by warrant. But the object of a warrant, whether it be issued in the first instance or upon failure of the defendant to appear to a summons, is, as s. 2 points out, in each case the same, to bring the defendant before the justices "to answer the said information or complaint and to be further dealt with according to law." It is only to be issued where the presence of the man is necessary in order that he may be dealt with according to law. But here the defendant's presence was not necessary for

1909

REX v. THOMPSON.

A. T. Lawrence J.

that purpose. The defendant had duly appeared by counsel, and thereupon it became incumbent upon the Court under the last paragraph of s. 13 to proceed to hear and determine the case. It has been contended that under s. 16 the justices have power to adjourn the hearing and to order the defendant into custody during the adjournment. But I think that that power only exists for the same purpose as that of issuing a warrant under s. 2, that of dealing with the man according to law. In such a case as the present where the defendant refuses to appear personally the proper course is to call such evidence of identity as is procurable, in which case the justices will naturally accept evidence of a much lighter degree than they would accept if the defendant was there to contradict it.

Rules absolute.

Solicitors for justices: *Wontner & Sons.*
Solicitors for defendant: *Kenneth Brown & Co.*

J. F. C.

Considered. In re DEBTOR, NO. 21 OF 1950 (NO. 2) [1951] 1 Ch. 612

1909

July 3, 6.

In re DRUMMOND. *Ex parte* ASHMORE.

Bankruptcy—Judgment Summons by Married Woman—Judgment Debtor a Creditor—Costs in Bankruptcy—Set-off—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

A creditor of a married woman, having obtained judgment against her separate estate in respect of a debt of over 50*l.* incurred by her whilst trading, presented a bankruptcy petition against her based on his judgment debt, but the petition was dismissed with costs, as the evidence failed to establish the act of bankruptcy alleged. She then obtained an order in the Bankruptcy Court for payment by the creditor of her taxed costs of the petition, which he did not comply with. Thereupon she took out a judgment summons against him under s. 5 of the Debtors Act, 1869, for not complying with the order. He had means to pay:—

Held, that the Court had no jurisdiction to set off his judgment debt against her taxed costs of the petition.

APPLICATION by way of judgment summons by a married woman.

1909

DRUMMOND, *In re.* ASHMORE, *Ex parte.*

On January 28, 1909, the debtor, Captain Drummond, obtained judgment in the King's Bench Division against the applicant, Mary Ashmore, a married woman, for 50*l.* 6*s.* 6*d.*, being the amount due to him on a dishonoured bill of exchange which had been accepted by her, the judgment being against her separate estate in the usual form. At the date when the debt was incurred Mrs. Ashmore was carrying on the business of a boarding-house, and the money had been lent her to assist her in purchasing the business. Early in January, 1909, Mrs. Ashmore sold the business and left the business premises. Captain Drummond, finding himself unable to realize his judgment, presented a bankruptcy petition against Mrs. Ashmore based on his judgment debt, the alleged act of bankruptcy being that she had "with intent to delay and defeat her creditors since the early part of January, 1909, absented herself and thereafter continued to absent herself from her place of business." On the hearing of the petition the Court held that the evidence failed to establish the alleged act of bankruptcy and dismissed the petition with costs. Mrs. Ashmore's costs of opposing the petition were taxed at 20*l.* 19*s.* 8*d.*, and on May 8 she obtained an order of the Bankruptcy Court against Captain Drummond for payment of the 20*l.* 19*s.* 8*d.*, but he did not comply with the order. She then on June 9 took out a judgment summons against Captain Drummond under the Debtors Act, 1869, to enforce payment of her taxed costs, which now came on for hearing. Captain Drummond in his affidavit in opposition to the summons submitted that he ought to be allowed to set off his judgment debt of 50*l.* 6*s.* 6*d.* against the 20*l.* 19*s.* 8*d.* He had on April 3, 1909, obtained judgment against her for another 50*l.* due to him. It was admitted that he had the means to pay.

D. M. Hogg, for the applicant. Costs in bankruptcy cannot be set off against the petitioning creditor's debt. If there were a set-off, no debtor could get a solicitor to act for him in bankruptcy proceedings, because to allow the set-off would defeat the solicitor's lien for costs: *In re Adams* (1); *In re Bassett* (2);

(1) (1880) 14 Ch. D. 37. (2) [1896] 1 Q. B. 219.

1909

DRUMMOND, *In re.* ASHMORE, *Ex parte.*

In re a Debtor. (1) Captain Drummond has the means to pay, and an order for his committal should be made.

[PHILLIMORE J. Why do you not sue him for the costs? You say he has means.]

He could, no doubt, be sued for the costs, but he would counterclaim for his judgment debt and be entitled to a set-off. The applicant is entitled to pursue her remedy under the Debtors Act.

A. M. Latter, for Captain Drummond. The rule in bankruptcy is not disputed, but this is an application under the Debtors Act. In the Chancery Division costs are allowed to be set off: *Bryon* v. *Metropolitan Saloon Omnibus Co.* (2); *Pringle* v. *Gloag.* (3) It is inequitable that the applicant should enforce payment of these costs when she owes Captain Drummond more than 100*l.* Under s. 5 of the Debtors Act the Court has a discretion, and it is submitted that in the present case the Court should in the exercise of its discretion make no order, but leave the parties to their remedy at law.

[PHILLIMORE J. I think Mrs. Ashmore is entitled to be paid, but I will not make an order if she can get relief in any other way. But if she cannot get the money in any other way I am afraid I must make an order. I think the case of *In re Bassett* (4) leaves me no alternative.]

The policy of the Debtors Act, 1869, is to abolish imprisonment for debt and to coerce fraudulent or contumacious debtors, and the jurisdiction under s. 5 is punitive. The present application is not a motion in bankruptcy, but a punitive proceeding, and it would be acting against the spirit of the Act if an order of committal were made against Captain Drummond. He is neither fraudulent nor contumacious. He is owed a great deal more than he owes, and he has done nothing for which he ought to be punished.

PHILLIMORE J. I have been struggling against making an order in this matter, but on the evidence I do not see how I can refuse to do so. No doubt the jurisdiction under s. 5 of the

(1) [1907] 2 K. B. 896.
(2) (1859) 4 Drew. 546.
(3) (1879) 10 Ch. D. 676.
(4) [1896] 1 Q. B. 219.

1909

DRUMMOND, *In re.* ASHMORE, *Ex parte.*

Phillimore J.

Debtors Act, 1869, is punitive in a sense. The Court only makes an order of committal against a man who can pay and will not pay. If it is to be called an offence and a punishment, I should call the offence contumacy in not obeying the order of the Court to pay the amount of the taxed costs. I must make an order, but, as this is the first application, the order will be that Captain Drummond do pay the 20*l.* 19*s.* 8*d.* by two equal instalments; the first instalment to be paid in a month.

Solicitors: *Cooper & Bake; P. Jerome.*

H. L. F.

NOKES *v.* STRONG.

1909

June 18.

Rates—Tenement wholly let out in Apartments—Owner—Agent to collect Rents — Rateability — Representation of the People Act, 1867 (30 *&* 31 *Vict. c.* 102), *s.* 7.

An agent who is employed by the owner of a dwelling-house, situate in a parliamentary borough, and wholly let out in apartments, to collect the rents on his behalf is not liable to be rated as owner under s. 7 of the Representation of the People Act, 1867.

CASE stated by a justice of the peace for the county of London.

By a general rate made for the borough of Islington on September 26, 1908, the appellant, Walter Frederick Nokes, was rated and assessed in the sum of 2*l.* 12*s.* 6*d.* in respect of a house known as No. 12, Edward Square, in the said borough, and on February 25, 1909, he was summoned for non-payment of that rate. The justice issued his distress warrant subject to this case for the opinion of the Court.

The appellant is an auctioneer and house agent, and as agent for the person entitled received the rack rents of a certain house known as 12, Edward Square, in the borough of Islington, for the use of that person.

As provided by the London Government Act, 1899, the general rate of the metropolitan borough of Islington (which rate was established by the Metropolis Management Act, 1855) and the

1909

NOKES v. STRONG.

poor rate of the said borough are assessed, made, and levied together by the mayor, aldermen, and councillors of the borough (hereinafter called the council) as one rate, which pursuant to the said London Government Act, 1899, is termed "the general rate," and as provided by the said Act it is assessed, made, and levied as if it were the poor rate, and by the said Act it is also provided that all enactments applying or referring to the poor rate (subject to the provisions of the said Act as to audit) are to be construed as applying or referring also to the general rate thereby established.

By the general rate for the said borough duly made on September 26, 1908, the appellant was rated and assessed as owner in respect of the said house, 12, Edward Square. The appellant was not and never was the occupier of the said house, and had no personal interest other than that he received the rack rent thereof as the agent for another person. The house was at the date of the rate, and had been for many years, wholly let out in apartments or lodgings not separately rated. The appellant was so rated by the council in respect of the said house pursuant to the last clause of s. 7 of the Representation of the People Act, 1867 (1), which is as follows: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." The council where the owner is rateable under the said section in every case rate the person receiving the rack rent of the rateable hereditaments as owner even in cases where such person is

(1) By s. 7 of the Representation of the People Act, 1867, "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:

"1. After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier except as hereinafter mentioned;

. . . . .

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

merely an agent, and it was agreed between the parties that the case herein set out should be a test case. The borough of Islington has been since before the year 1867 wholly situate in a parliamentary borough.

It was contended by the appellant that he was wrongly rated as owner under the circumstances herein set out, and that such an agent receiving the rents could not be rated as an owner under the said clause.

It was contended on behalf of the respondent that inasmuch as there was no definition of the word "owner" in the Act of 1867, and as at the time of the passing of that Act there were many Acts of Parliament in force relating to the rating of owners, and in particular the Islington Parish Act, 1857 (20 & 21 Vict. c. cxviii.), whereby it was enacted that the person receiving the rents of a house or premises from the occupiers thereof respectively should be rated to the poor rate, and as by the Poor Rate Assessment and Collection Act, 1869, "owner" means any person receiving or claiming the rent of the hereditament for the use of any person for whom he is acting as agent, the agent receiving the rent of a hereditament could properly be rated as owner in cases coming within s. 7 of the Act of 1867.

Kyffin, for the appellant. There is no definition of the word "owner" in the Act of 1867, and in the absence of a definition giving an artificial meaning to that word, such as is to be found in the Small Tenements Act, 1850 (13 & 14 Vict. c. 99) (1), and many local Acts, it must be understood in its ordinary sense as meaning the person entitled, and not as including that person's agent. The respondent seeks to read in the definition from s. 20 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), which is in the following terms: "the word 'owner' shall mean any person receiving or claiming the rent

(1) By s. 9 of the Small Tenements Act, 1850, "the word 'owner' shall be construed to mean any person receiving or claiming the rent of any such tenement for his own use or receiving the same for the use of any corporation aggregate, or of any public company, or of any landlord or lessor who shall be a minor, under coverture, or insane, or for the use of any person who shall not be usually resident within twenty miles from the parish in which such tenement shall be situated."

1909

NOKES v. STRONG.

of the hereditament . . . . for the use of any person for whom he is acting as agent." But the Act of 1867 must be construed as if the question had arisen immediately after that Act had been passed. You cannot go to a later Act and read a definition into an earlier Act unless the two Acts are directed to be read as one. In *White and Hales* v. *Islington Corporation* (1) the Lords Justices expressly said that the part of s. 7 of the Act of 1867 which provides for the rating of houses wholly let out in apartments is not in any way affected by the Act of 1869, and they accordingly held that an owner who is liable to be rated under s. 7 is not entitled to the abatement allowed to owners by the later Act.

Lush, K.C., and *Ryde*, for the respondent. The contention is that the "owner" mentioned in the last part of s. 7 is the same person as the "owner" referred to in the first lines of the section as being "rated at the time of the passing of this Act." But the owner who was rated at the time of the passing of that Act included an agent, for the various Acts which provided for an owner being rated contained a definition of owner which included agents. Therefore the term "owner" as applied to the person who is liable to be rated by reason of the fact that his house is let out in apartments must equally be held to have the wider meaning. The decision in *White and Hales' Case* (1) is no authority against the present contention; it had nothing to do with the question as to who is the owner; and the dicta in that case that the Act of 1869 did not affect s. 7 of the Act of 1867 did not go the length of saying that "owner" could not include "agent."

Kyffin, in reply.

LORD ALVERSTONE C.J. It seems to me that, as we are bound to adopt the construction laid down by the Court of Appeal in *White and Hales* v. *Islington Corporation* (1), we must give judgment in favour of the appellant. In the earlier case of *Davis* v. *Wallis* (2), which was overruled in the later case, I took the view that the Act of 1867 was intended only to be a franchise Act and not a rating Act, and that the passage in s. 7 which says

(1) [1909] 1 K. B. 133. (2) [1908] 2 K. B. 134.

1909

NOKES v. STRONG.

Lord Alverstone C.J.

that "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate" was intended to refer to the cases in which owners were upon the rate-book under certain earlier Acts of Parliament, and was not intended to give a general franchise to the owners of all houses that are let out in apartments, of whatever value they may be. But that must now be regarded as wrong, the Court of Appeal having decided that that clause is a substantive enactment that if the house is wholly let out in apartments the owner is to be put on the rate-book. Now there is no definition of the term "owner" in the Act of 1867, and the contention now put forward by Mr. Lush is that it is to be understood as including an agent who collects the rents on behalf of the owner. It is clear that at the time of the passing of the Act of 1867 such an agent would in this particular parish have been rated under s. 12 of the Islington Parish Act, 1857. It is also clear that under s. 21 of Sturges Bourne's Act such an agent would be liable to be rated in the events there specified. Then Mr. Lush contends that the same meaning must be given to the word "owner" in the different paragraphs of s. 7, and that as at the beginning of the section, where it speaks of the owner being rated at the time of the passing of the Act, the word must be assumed to include an agent, it must equally be assumed to include an agent in the later paragraph which deals with the owner of a dwelling-house let out in apartments. Now I do not think that the actual decision of the Court of Appeal necessarily conflicts with that contention, but I think that the reasoning upon which their judgments proceeded does so, and particularly the passage in Buckley L.J.'s judgment at pp. 151—152, where he deals with the question whether the words "no owner of any dwelling-house" are to be understood to mean "no owner who if this Act had not been passed could have been rated instead of the occupier." I can see a very good reason why in the case of the small tenements that were dealt with by the Small Tenements Act, 1850, and by the Act of 1869 there should be a definition of "owner" which included agents. Of course one knows perfectly well

1909

NOKES v. STRONG.

Lord Alverstone C.J.

that in many cases the owners of small tenements are unknown and the estate is really managed by the agent, and, consequently, in such cases one would naturally expect a wide definition of the word "owner." But when once you have it established that the latter part of s. 7 is an enactment which is to be taken as saying that the owner of any house wholly let out in apartments, whatever its value may be, is to be rated, the reason for including agents in the definition of "owner" disappears. I wish to say that if the true view of this Act had been that it was a franchise Act and not a rating Act I should have come to a different conclusion, and should have read the word "owner" in the same sense as that in which it was understood before the passing of that Act. But I think for the reasons which I have stated that this appeal should be allowed upon the ground that an agent is not under this statute treated as the owner for the purpose of imposing on him the liability to pay the rates.

JELF and A. T. LAWRENCE JJ. concurred.

Appeal allowed.

Solicitor for appellant: *H. A. Phillips.*
Solicitor for respondent: *A. M. Bramall.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 23;
April 1.

UPPER FOREST AND WESTERN STEEL AND TINPLATE COMPANY, LIMITED *v.* THOMAS.

Employer and Workman—Compensation—Agreement—Registration—Review of Weekly Payment—Form of Application to Review—Date from which Review may be ordered—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., par.* 12; *Sched. II., par.* 8.

An application under the Workmen's Compensation Act, 1897, to record an agreement between a workman who had been injured by an accident arising out of and in the course of his employment and his employer for payment of a weekly sum to the workman during incapacity was opposed by the employer on the ground that the man had recovered. The county court judge, however, ordered the agreement to be recorded, but granted a stay to enable the employer to apply for a review. The employer by his application to review asked for termination of the weekly payment, the ground alleged in the particulars being that "the respondent has completely recovered" from the accident, without specifying any date. The county court judge found that the incapacity of the workman had ceased at an antecedent date and ordered that the payment should terminate from that date:—

Held, that upon an application to review in this form the judge had no jurisdiction to order a review from a date antecedent to the application, and that the award ought to be set aside.

Appeal from an award of the county court judge of Swansea sitting as arbitrator under the Workmen's Compensation Act, 1897.

On March 15, 1907, Thomas Thomas was employed at the works of the Upper Forest and Western Steel and Tinplate Company, Limited, in placing a piece of old boiler in a furnace; it fell upon him and broke his leg and otherwise injured him, with the result that he was incapacitated from work. The employers paid the workman 1*l.* per week as compensation from the date of the accident until December 27, 1907, when the payments ceased. On January 7, 1908, Dr. Williams, the doctor of the works, in whose charge the workman was, gave the employers a certificate that the man had made a splendid recovery and was perfectly fit to follow his employment. This certificate was not formally communicated to the workman, but

C. A. 1909

UPPER FOREST AND WESTERN STEEL AND TINPLATE COMPANY, LIMITED. v. THOMAS.

when his daughter next attended at the works to receive his pay she was informed that the employers declined to pay him any longer on the ground that the doctor had said that he had recovered.

On May 26, 1908, at the request of the employers, the workman submitted himself for examination by Dr. Edwards, of Swansea, and on the same day Dr. Edwards certified to the employers that the man was not then incapacitated from following his employment as the result of the accident. This certificate was communicated to the workman on May 29.

On June 26, 1908, the workman applied for registration of a memorandum of a verbal agreement come to between the employers and the workman on April 6, 1907. The memorandum was in these terms: "Be it remembered that on the 15th day of March 1907 personal injury was caused to the above named Thomas Thomas by accident arising out of and in the course of his employment, and that on the 6th of April the following agreement was come to by and between Thomas Thomas and the Upper Forest Steel and Tinplate Company Limited that is to say that the Upper Forest Steel and Tinplate Company Limited should pay to Thomas Thomas 1*l.* per week as compensation from the 15th day of March 1907 and to continue during the time that Thomas Thomas is unable to follow his employment, but subject to such compensation being reduced or determined upon Thomas Thomas being able to take light employment or resume his usual employment as the case may be."

This application was opposed by the employers on the ground that the man had been well since January 7.

On September 8, 1908, the county court judge ordered the agreement to be recorded, but stayed execution in order to give the employers an opportunity of applying to review.

On September 11 the employers filed a request for an arbitration with respect to the determination of the weekly payments. The relief sought was termination or diminution, and the ground on which that relief was claimed was "that the respondent has completely recovered from the injuries received by his said accident or in the alternative that the respondent has been and is capable of taking light employment."

The matter came on for hearing on October 8.

The county court judge found that the workman had not been suffering from the accident since January 7, 1908, and awarded compensation to that date.

The workman appealed.

Eldon Bankes, K.C., and *Meager*, for the workman. Upon an application to review framed in general terms, such as the present, the judge has no jurisdiction to decide whether the workman's incapacity had ceased at a date prior to the initiation of the proceedings by which that question was raised. There is some difference of opinion between the English and the Scottish Courts as to the date from which an order may be made upon an application to review. In Scotland it has been held that the judge has no jurisdiction to make an order for termination or diminution except as from the date when he pronounces judgment. It has been held, on the contrary, by the Court of Appeal in this country that the judge may go back to the notice of application: *Francis Morton & Co., Ld.* v. *Woodward.* (1) But it has never been held that the judge can go back further than that. The arbitrator has gone outside his submission and has decided a question which was not before him. The award ought therefore to be set aside. Assuming that the county court judge had jurisdiction to inquire into the workman's condition prior to the date of the application, the employers by requesting the man to submit himself for examination proceeded on the footing that he was then incapacitated, and therefore the county court judge could not review the payments prior to May 29, when the certificate of Dr. Edwards was communicated to the workman.

Clavell Salter, K.C., and *Llewellyn Williams*, for the employers. The liability to pay compensation under the Act is during incapacity only, and assuming termination of incapacity in fact and that the issue as to the date at which the incapacity ceased was actually raised, there is nothing in the Act to limit the power of the judge to determine the real question between the parties.

[COZENS-HARDY M.R. I do not gather that there is any

(1) [1902] 2 K. B. 276.

C. A. 1909

UPPER FOREST AND WESTERN STEEL AND TINPLATE COMPANY, LIMITED v. THOMAS.

distinction between this case and *Francis Morton & Co.* v. *Woodward.* (1) If the application to review does not fix any antecedent date, I do not think that the arbitrator has any jurisdiction to go beyond the date of the application. If your application had been for a review from January, 1908, or whatever the date was when you allege that the man had recovered, it may be that the broader question which you invite the Court to decide might have been properly raised upon the present application, but that was not the question which was referred to the arbitrator.]

If the Court decides this case simply upon the form of the application to review, that is an end of the matter.

COZENS-HARDY M.R. I think that the arbitrator had no jurisdiction to make this award. It was not referred to him to ascertain what was the state of the injured man at a previous date. It is really unnecessary for the Court to consider whether, if the matter had been referred to the arbitrator, it would have been competent to him to decide that the incapacity had ceased at a previous date. I desire to leave that an open question, and I must not be taken as indicating a view one way or the other upon the point. That was not the question referred to the arbitrator upon this application. This appeal will be allowed with costs, and the award must be set aside.

FLETCHER MOULTON and FARWELL L.JJ. concurred.

Appeal allowed.

Solicitors: *T. D. Jones & Co., for Edward Harris, Swansea; Smiles & Co., for Gee & Edwards, Swansea.*

(1) [1902] 2 K. B. 276.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1909
May 26, 27.

CRASKE *v.* WIGAN.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A lady's maid in the course of her employment was sewing in her employer's nursery, which was lighted by electric light. A cockchafer flew into the room by an open window and so alarmed her that she involuntarily struck her eye with her hand and permanently injured her eyesight. Upon an application for compensation under the Workmen's Compensation Act, 1906:—

Held, that the injury was not caused by an accident arising out of the employment within the meaning of the Act and that the application failed.

APPEAL from an award of the county court judge of Gloucester sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was employed as lady's maid and sewing maid to the respondent's wife and children. On June 4, 1908, between 8.30 and 9 P.M., the applicant was sitting sewing in the nursery, waiting for her mistress to come up to bed. She had just finished some sewing for her mistress and had started on some work for herself. To the knowledge and with the consent of her mistress the applicant worked in the nursery instead of in her own room, and employed her spare time while waiting for her mistress in doing needlework for herself. The nursery was lighted by electricity, and it being a hot night, the windows were open. While the applicant sat sewing, a cockchafer flew into the room, and the applicant in throwing up her hand to prevent it striking her in the face hit her right eyeball so violent a blow with the bent knuckle of her right thumb as to cause an injury which rendered necessary three operations and resulted in the ultimate loss of the lens of the eye and consequent permanent defective vision.

The learned county court judge held that the accident did not arise out of the employment. He thought that the true cause of the accident was the involuntary act of the applicant arising from her nervous apprehension of the erratic flight of

C. A. 1909

CRASKE v. WIGAN.

the cockchafer. It could not be said that the usual probable result of an insect flying into a room lit up with electricity was that somebody sitting there would strike her own eye so violent a blow as to cause iritis and traumatic cataract. Such a risk could not have been within the contemplation of either master or servant. The question might, moreover, be tested by asking oneself whether the accident could have occurred if the applicant had not happened to be holding a needle in her hand in the act of sewing. The answer was that the accident might have occurred anywhere. In his opinion there was no such connection between the origin of the accident and the occupation as would justify an arbitrator in holding that the accident arose out of as well as in the course of the employment. He therefore awarded that the applicant was not entitled to compensation.

The applicant appealed.

Hume Williams, K.C., and *Barrington Ward*, for the appellant. This is an accident arising out of and in the course of the employment. The county court judge was wrong in taking as the test of that question the question whether the risk of such an accident could reasonably have been within the contemplation of the parties at the time when the contract of service was entered into. That is not the test: *Andrew* v. *Failsworth Industrial Society.* (1) The test is whether the origin of the accident was reasonably incidental to the character of the employment: *Armitage* v. *Lancashire and Yorkshire Ry. Co.* (2); *Fitzgerald* v. *W. G. Clarke & Son.* (3) Applying that test, there is here a sufficient connection between the accident and the nature of the occupation to justify the conclusion that this was an accident arising out of the employment within the meaning of the Act: *Fenton* v. *Thorley & Co.* (4); *Wicks* v. *Dowell & Co., Ld.* (5); *Ismay, Imrie & Co.* v. *Williamson* (6); *Stewart* v. *Wilson's and Clyde Coal Co.* (7); *Rowland* v. *Wright.* (8)

Bankes, K.C., and *Wethered*, for the respondent, were not called upon.

(1) [1904] 2 K. B. 32.
(2) [1902] 2 K. B. 178.
(3) [1908] 2 K. B. 796.
(4) [1903] A. C. 443.
(5) [1905] 2 K. B. 225.
(6) [1908] A. C. 437.
(7) (1902) 5 F. 120.
(8) [1909] 1 K. B. 963.

C. A. 1909

CRASKE v. WIGAN.

COZENS-HARDY M.R. Notwithstanding the very ingenious arguments of counsel for the applicant, I cannot bring myself to doubt that the county court judge was quite right in the award which he made. The applicant really asks us to remove from the Act as non-existent the words "arising out of the employment." The facts may be shortly stated. A lady's maid was engaged in the nursery doing some work of her own which she was entitled to do, and the doing of which did not prevent her from being at that time in the course of her employment. It was a hot evening. The window was open, and the light in the nursery happened to be electric light. A cockchafer came in at the window. She was alarmed at it and hit her own eye with her thumb, with very serious consequences. In that state of things is it possible for us to say that this was an accident arising not merely "in the course of" but "out of" the employment? It seems to me that that was a risk in no way incidental to the employment of a lady's maid. She was not placed by reason of the employment in a position of any special danger. The incursion of a cockchafer through an open window into a room where there is a light is a risk common to all humanity, and it is altogether impossible to say that the alarm caused to the applicant by the flight of the cockchafer, followed by her putting her thumb into her eye, was something which arose out of her employment. Several authorities have been cited to us, no one of which seems to me in any way to help the applicant. In *Andrew* v. *Failsworth Industrial Society* (1) (the lightning case) the man was working on a high scaffold and was placed by reason of his employment in a position of special danger where he was more liable to be struck by lightning than if he were an ordinary person. It was there held that that was an accident arising out of his employment because there was a peculiar risk incidental to his employment by reason of the place where he had to work. Then there was the case of *Challis* v. *London and South Western Ry. Co.* (2) (the engine driver's case). That case really turned on this, that there was evidence which satisfied the county court judge that there was an irresistible temptation to small boys to drop stones on to a train as it passes under a railway bridge. In

(1) [1904] 2 K. B. 32. (2) [1905] 2 K. B. 154.

C. A. 1909

CRASKE v. WIGAN.

Cozens-Hardy M.R.

that case a boy dropped a stone which hit the glass of the cab of the engine where the driver was, with the result that the fragments of glass were driven into his eye. We there held that that was a risk incidental to his employment. To quote a few words from my own judgment in that case, I said: "It seems to me that the risk of such an occurrence is one which may reasonably be looked upon as incidental to the employment of an engine driver, though it might not be incidental to other employments." The next case is *Rowland* v. *Wright* (1) (the stable cat case). That case, in my opinion, has no bearing on this. A stable cat was really part of the furniture of the stable. The man was, in the recognized discharge of his duty, taking his meal quietly in the stable when the cat without any provocation flew at him and bit him. That was just as much an accident arising out of his employment as if he had been kicked or bitten by a horse in the stable. Then there is the case of *Fitzgerald* v. *W. G. Clarke & Son* (2), which certainly gives no support to the applicant's case. That was a case where, there being a hoist, some of the fellow workmen of the injured man fastened the hook of the hoist to his coat collar and hauled him up, with the result that he fell and was badly hurt. It was there argued that if boys got larking over their work and thereby occasioned an accident to a fellow workman the accident might be properly said to arise out of the employment; but we rejected that argument and held that that was an accident not in any way arising out of the employment within the meaning of the Act.

I think it would be dangerous to depart from that which, so far as I am aware, has been the invariable rule of the Court of Appeal since these Acts came into operation, namely, to hold that it is not enough for the applicant to say "The accident would not have happened if I had not been engaged in that employment or if I had not been in that particular place." He must go further and must say "The accident arose because of something I was doing in the course of my employment or because I was exposed by the nature of my employment to some peculiar danger." Unless something of that kind is established the applicant must fail, because the accident is not one arising

(1) [1909] 1 K. B. 963. (2) [1908] 2 K. B. 796.

out of and in the course of the employment. In my view we should not be administering law and justice if we did not hold that the learned judge was quite right. The appeal must be dismissed.

BUCKLEY L.J. As to the meaning of the words "arising out of and in the course of the employment" I adhere to what I said in *Fitzgerald* v. *W. G. Clarke & Son* (1): "The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from a risk reasonably incident to the employment." The risk that a cockchafer may on a hot summer evening fly into a lighted room is a risk, if it be a risk at all, which is common to all humanity, and bears no relation to the employment of a lady's maid. The fact that the applicant struck herself was due, no doubt, to involuntary excessive muscular action arising from the excessive susceptibility of her own nerve centres. It was not due to any cause attributable to her employment as a lady's maid. The blow was not an accident arising out of the employment. The arguments on behalf of the applicant have been too extravagant to do more than provoke a smile. I feel a difficulty in dealing with them in a serious vein. While copious in amusement, they have carried with them no conviction.

KENNEDY L.J. I agree with the judgments which have just been delivered. It is so plain a case that I have nothing to add.

Appeal dismissed.

Solicitors: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Frederic Hall, Folkestone; Watson, Sons & Room, for Wansbrough, Robinson, Tayler & Taylor, Bristol.*

(1) [1908] 2 K. B. 796, at p. 799.

H. B. H.

C. A

1909

May 27, 28; *June* 28; *July* 1.

[IN THE COURT OF APPEAL.]

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY COMPANY *v.* BOOTS.

Employer and Workman—Compensation—Agreement—Registration—Review of Weekly Payment—Form of Application to Review—Date from which Review may be ordered—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16; *Sched. II., par.* 9.

Upon an application under the Workmen's Compensation Act, 1906, for a review and termination of a weekly payment payable by way of compensation to a workman who has been injured by an accident arising out of and in the course of his employment, under an agreement between the employer and the workman, where the ground on which termination is claimed is stated in the particulars to be that the incapacity resulting from the injury has ceased, without specifying any date, it is not competent to the arbitrator to award that the payment shall terminate from a date antecedent to the application to review.

So *held* by the Court of Appeal (Buckley L.J. dissenting) on the authority of *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas*, ante, p. 631.

But *semble* where the application to review asks in express terms for termination from a definite antecedent date it is competent to the arbitrator to order termination from that date.

Appeal from an award of the county court judge of Westminster sitting as arbitrator under the Workmen's Compensation Act, 1906.

On December 26, 1907, Harry Boots, a workman in the employ of the Charing Cross, Euston, and Hampstead Railway Company, met with an accident arising out of and in the course of his employment. The company paid him 10*s.* per week until he returned to work on February 8, 1908. He continued in the employment of the company until October 21, a week's notice having been given. There had been occasional absences from work between February and October which were alleged to be due to the accident. On December 1 the workman applied under par. 9 of the Second Schedule to record a memorandum of the agreement which was come to shortly after the accident. The agreement as set out in the memorandum was dated January 20, 1908, and was so far as

material in the following terms:—"The employer agrees to pay the workman the sum of 10*s.* per week in compensation for the said injuries such weekly payments to commence from the time of the said accident and to continue during the incapacity of the workman or until the same shall be ended diminished increased or redeemed in pursuance of the said Act." Notice was given to the employers, and on December 9 they, acting under the power given by clause (*b*) of par. 9, gave notice that they objected to the memorandum being recorded on the ground that the workman had in fact returned to work at the same wages as he earned before the accident. The matter came before the judge on March 4, when the following order was made:—"Memorandum ordered to be registered. Stay fourteen days to be continued if notice of appeal or application to review given by that time. If no notice as aforesaid applicant to have costs column 'A.'"

On March 13, 1909, the employers requested an arbitration with respect to the review and termination of the weekly payment payable to the said Harry Boots under the said Act in respect of personal injury caused to him by the accident arising out of and in the course of his employment. The particulars annexed so far as material were: (4.) Date of agreement, January 20, 1908; ordered to be recorded in this Court on March 4, 1909. The weekly payment of 10*s.* commenced on the 2nd day of January, 1908. (5.) Relief sought by applicant, termination of the said weekly payment. (6.) Grounds on which termination is claimed: that the incapacity for work resulting from the injury has ceased.

On April 5 the workman, by his answer, stated that he intended on the hearing of this arbitration to give in evidence and to rely upon the following facts:—

"That on December 26, 1907, the respondent was crushed between two railway carriages, receiving severe bruises and contusions.

"That as a result of the said injuries varicose veins have set up in the respondent's legs, which unfit him for his occupation.

"That the respondent is still incapacitated from following his usual employment. That the varicose veins in the respondent's legs are increasing and will gradually get worse."

C. A. 1909

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY v. BOOTS.

On April 22, 1909, the matter came on before the judge, who made his award in the following terms :—" A declaration of liability on part of applicants and a finding that respondent not incapacitated since October 21, 1908, and not now incapacitated. Each party to bear his own costs of this proceeding. Employer to pay costs of application to record memorandum of agreement (No. 408)."

The workman appealed.

Simon, K.C., and *W. Shakespeare*, for the workman. An application to review a weekly payment on the ground that the incapacity has ceased, without specifying any particular date, only entitles the county court judge to review as from the date of the application ; it does not entitle him to make a retrospective declaration. The county court judge has therefore exceeded his jurisdiction : *Francis Morton & Co., Ld.* v. *Woodward* (1) ; *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas.* (2) It is open to an employer upon a workman's application to record an agreement to say that though the agreement was entered into it has ceased to have any effect, and if the employer proves that the workman has in fact returned to work and is earning the same wages as before the accident, the county court judge may either refuse to record the agreement or may impose such terms as he thinks just : see Sched. II., par. 9 (*b*). The scheme of the statute distinguishes between the action of the county court judge as recorder and his action as reviewer, and in this case the judge acting as reviewer has done something which it was only competent for him to do as recorder. If the employers wanted to go into the question of the man's capacity in October, 1908, they ought to have appealed against the order of March 4, but it was not open to them to go into that question upon this application to review. [They also referred to *Field* v. *Longden & Sons.* (3)]

Eldon Bankes, K.C., and *Scarlett*, for the employers. Having regard to the employers' notice of objection to the recording of the agreement, which was in accordance with clause (*b*) of par. 9 of the Second Schedule—a new provision inserted in

(1) [1902] 2 K. B. 276. (2) Ante, p. 631.
(3) [1902] 1 K. B. 47.

consequence of the decision of the Divisional Court in *Blake* v. *Midland Ry. Co.* (1) under the Act of 1897—and to the grounds stated in their application to review, and to the workman's answer to that application, it is submitted that throughout the proceedings before the county court judge the question and the sole question between the parties was whether the incapacity had ceased and at what date. In the face of these documents it cannot be said that the question of the date when the incapacity ceased was not before the judge, and it was in order to keep that question open that the stay was granted. There is no authority which precludes the arbitrator from inquiring as to the workman's incapacity prior to the date of the application to review, assuming that the submission is wide enough. *Francis Morton & Co., Ld.* v. *Woodward* (2) does not decide the contrary. In that case the only relevant dates were the date of the application and the date of the award. In *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (3) the decision was merely that the form of the submission in that case was such that the judge had no jurisdiction. That case is distinguishable from the present because here the workman by his answer to the application to review invites the judge to go into the whole question. [They also referred to *Southhook Fire-Clay Co., Ld.* v. *Laughland.* (4)]

Simon, K.C., in reply.

Cur. adv. vult.

COZENS-HARDY M.R., after stating the facts substantially as above stated and observing that as he understood the order of March 4, 1909, the stay was not a stay of registration, but only a stay of execution, so that the workman could not during that stay enforce payment of the 10*s.* per week for any period either before or after March 4, continued as follows:—The appeal raises several points of difficulty and of importance as to the procedure which ought to be adopted when the employer desires to raise a contention that the agreement originally made has by reason of subsequent circumstances become inoperative.

(1) [1904] 1 K. B. 503.
(2) [1902] 2 K. B. 276.
(3) Ante, p. 631.
(4) (1908) Sess. Cas. (Sc.) 831.

C. A. 1909

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY v. BOOTS.

Cozens-Hardy M.R.

I think it is plain that by virtue of the new power given in par. 9 (*b*) of the Second Schedule it is competent to the employer to say that the workman has completely recovered and has returned to work and is earning his old wages, and if the county court judge finds this is established he ought to decline to record the agreement, unless he thinks it is a case in which the effects of the accident may hereafter appear not to have been got rid of. In such a case he may record it, and may stay execution with a view to an application by the employer to review or terminate it. When an application to review is made, under par. 16 of the First Schedule, there has been a serious difference of opinion between this Court and the Court of Session as to the date from which review can be granted. This Court in *Francis Morton & Co., Ld.* v. *Woodward* (1) held that it is competent to the arbitrator to terminate a payment from a date antecedent to the date on which his award is made. In that case the only relevant date was the date of the application. That case was followed in the recent case of *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (2) in April last, and possibly extended in so far as it held that it is not competent to an arbitrator, on a simple application to terminate payment on the ground that incapacity has ceased, to make an order terminating liability from an antecedent date. I was a party to both those decisions. They are binding upon this Court in so far as they do not depend upon particular circumstances, and in my opinion they do decide that on a simple application, such as we have here and such as there was in the case of *Thomas* (2), the arbitrator cannot go outside the submission, the submission being simply this: Was the workman at the date of the application incapacitated? In the case of *Thomas* (2) I expressly abstained from deciding whether, if the application to review asks a declaration from a definite antecedent date, the same principle would apply, but I intimated the opinion, to which I still adhere, that if there is a formulated dispute as to a workman's incapacity at a particular date, it is competent to the arbitrator to decide that dispute. In my opinion the arbitrator has exceeded his jurisdiction in directing on this application to review that the compensation of 10*s*.

(1) [1902] 2 K. B. 276. (2) Ante, p. 631.

per week should cease as from October 21, 1908. If that direction stands, it will be impossible for the workman to raise the contention, which he desires to raise, that the stay of execution, if still in force, ought to be removed during the period from October 21 until March 13. It is open to some doubt whether the stay imposed by the order of March 4 is still in force. I think Mr. Simon's view that it is still in force is probably correct, but to avoid any question it will be right, while allowing the appeal so far and only so far as it relates to the direction I have referred to, to add a stay of execution under the recorded agreement, with liberty to the workman, if so advised, to apply to remove the stay during all or any part of the period up to March 13, 1909.

BUCKLEY L.J. The obligation towards the injured workman imposed by the Act upon the employer is an obligation to pay him compensation during incapacity. Where the proceedings are by way of arbitration and award and the issue of capacity or incapacity is raised, the judge must determine the question of incapacity. Having done so, he fixes the amount of compensation and orders payment.

When the proceeding is by agreement as to the amount of compensation and record of the agreement, the result of its record is that the memorandum is for all purposes enforceable as a county court judgment (Act of 1906, Sched. II., par. 9). If upon the proceedings to obtain the record of the memorandum the employer denies incapacity, it is impossible that the Court should without determining that issue record the agreement, with the result that it becomes enforceable as a county court judgment, when the contention of the employer is that by reason of incapacity ceased the agreement is not operative, and that therefore no agreement is in existence. Paragraph 9 (*b*) provides for the case. The duty of the Court then is to record the agreement only on such terms as the Court thinks just. In the supposed case the question of incapacity must either be tried and the agreement recorded only in the event of its being found to be operative, or if the question of incapacity be postponed, then the record must be made on such terms as to leave the question open and so that

C.A. 1909

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY v. BOOTS.

Buckley L.J.

the recorded agreement shall not operate as a judgment until that question has been tried. This must be done, not by staying execution of the hypothetical county court judgment, but by so recording the agreement as that it shall not operate as a judgment. In the present case the employer by his notice of December 9, 1908, raised the objection that incapacity had ceased, and accordingly on December 10 the Court accepted that as the issue in the case and gave notice in the form that the genuineness of the memorandum was disputed on that ground. This is the form commonly used, and in such a case as the present means that the employer affirms not that there never was such an agreement made, but that the agreement is inoperative because incapacity has ceased. On January 26, 1909, the workman then applied for an order for registration of the memorandum, and on March 4 the Court, without trying the issue of incapacity ceased, made an order in these terms: "Memorandum ordered to be registered. Stay fourteen days to be continued if notice of appeal or application to review given by that time. If no notice as aforesaid applicant to have costs column 'A.'" The agreement so ordered to be so recorded was, it is true, only an agreement to pay during incapacity, but if the employer was right upon the issue that incapacity had ceased there was no agreement to record, because the period during which it was to be operative was over and the agreement was spent. If that order means not that execution of the judgment for enforcement of the agreement shall be stayed, but that execution of the order for registration of the agreement be stayed, I think it is right. I remain of opinion that that order was intended to have the effect of keeping open that which was the only point at issue between the parties, namely, whether incapacity had ceased, and that that issue was intended to be disposed of on the application to review mentioned in the order. If that is not its meaning I think it was a wrong order. That order of March 4 is not under appeal, but I should have entertained an application to give, if necessary, an opportunity of reviewing it. I shall certainly seek to do justice in this case by so dealing with the application to review which is under appeal as not to give to the order of March 4 such an effect as would

but for concessions made by the workman put him in a position to levy execution under that order for a sum to which the judge by the order under appeal determined (if he had jurisdiction to do so) that the workman was not entitled. The facts here are that the agreement upon its face provided only for payment during incapacity. The employers by their notice of December 9 and their application to review dated March 13 alike objected to the memorandum on the ground that the workman had in fact returned to work and incapacity had ceased. Their original objection was, I think, intended to be saved to them by the order of March 4. Their application of March 13 was, I think, in such a form as that it was competent upon that application to prove the date or dates at which the workman from time to time returned to work, and thus to shew that the agreement, although it had in fact been executed, was satisfied as to the past and was spent as to the future inasmuch as the workman had been paid the agreed sum during incapacity and incapacity had come to an end. I am satisfied that that issue was in fact tried by the judge on the application to review, and that he decided, and in my opinion he had jurisdiction to decide, that from October 21, 1908, the workman was entitled to nothing. We have been strongly urged that this Court in *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (1), decided in April last, has laid down some matter of principle which prevents us from saying that it was competent to the judge on the application to review to go back to a date earlier than the date of the application to review. In that case the decision in *Francis Morton & Co., Ld.* v. *Woodward* (2) was relied on, but when that case is examined it will be found to have no bearing upon the question. The facts there were that, notwithstanding that the workman was said to have recovered on September 2, the employers continued to pay him compensation to November 11, and that on November 12 they filed their notice to review. All that was decided was that the Court had jurisdiction to inquire not merely whether incapacity had ceased at the date of the decision, but whether it had ceased at the date of the application to review or at any and what subsequent time. In the facts of that case the

(1) Ante, p. 631. (2) [1902] 2 K. B. 276.

C. A. 1909

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY v. BOOTS.

Buckley L.J.

question did not and could not arise whether there was jurisdiction to go back to a date earlier than that of the application to review. There is nothing, in my opinion, to be found in *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (1) as matter of principle to shew that where the issue is raised the judge cannot go back to the relevant date. There is nothing in the statute to prevent it, and the question is only one, I think, of what are the issues which have been presented to the tribunal in the case in which the decision is invited. Here it is plain to me that from the first the only question between the parties was whether incapacity had ceased and when it had ceased. The Court could not by an order to record the memorandum simpliciter, which would have the effect of a judgment, deal with the case without deciding the issue thus presented to it. I think the issue was presented to it. I think the judge tried it and decided it in favour of the employers. The workman has offered to concede that the question shall be tried upon an application to remove the stay of execution granted on March 4, but logically his position must be that but for that concession on his part there is a judgment in his favour. The other members of the Court, however, do not go with me in thinking that the issue of incapacity ceased was properly raised and tried. Under these circumstances I am content that the order should go in the form which seems to them right, but I think that the employers' costs of the application to review and the employers' costs of this appeal should be costs in the workman's application to remove the stay, and that if the workman does not within three weeks make such an application, then that the order below as to costs should stand, and the employers should have the costs of this appeal.

The case is one of large general importance, for if, as is happily not the case here, the agreement had been expressed to be, not to pay during incapacity, but to pay 20*s.* a week, and the agreement were recorded in such a way as it has been recorded here, the appellant's contention would lead to the result that the workman could by what has been called in argument a ministerial act of the Court become entitled to judgment for a sum which

(1) Ante, p. 631.

ex hypothesi is not due to him when the question of incapacity is tried. The act of recording an agreement is not ministerial but judicial, and can be done only after determination of the relevant issues. To make an order which has the effect of a judgment cannot be ministerial.

KENNEDY L.J. In my opinion this Court would not be justified, having regard to its very recent decision in *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (1), which has not yet appeared in the Law Reports, but of which a manuscript copy of the arguments and judgment has been supplied to us, in upholding the award of the county court judge entirely as it stands.

In *Francis Morton & Co., Ld.* v. *Woodward* (2) this Court had held that, on an application to review a weekly payment under the Workmen's Compensation Act, 1897, on the ground that the workman's incapacity has ceased, the arbitrator has jurisdiction to inquire and decide by his award whether the workman's incapacity had ceased, not merely at the date of the hearing, but at the earlier date when the application to review was made. In the *Upper Forest Case* (1), to which I have referred, and which was decided by this Court in April of this year, it was held that where, as in the present case, the application to review merely asks in general terms that the payment to the workman should be terminated, without specifying any particular date for the termination which is sought by the employer, the arbitrator is not entitled to consider the state of the evidence, in regard to capacity, at an earlier date than the date of the application.

In the present case the respondents' application to review was in the same general terms as in the *Upper Forest Case.* (1) There was no application to amend made to the learned county court judge before whom the arbitration proceeded, nor was any amendment in fact made; and the objection to his considering the condition of the workman at an earlier date than the date of the application to review was clearly taken by the learned counsel who appeared on the workman's behalf. The county court judge, however, who heard the application on April 22 last, admitted

(1) Ante p. 631. (2) [1902] 2 K. B. 276.

C. A. 1909

CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY v. BOOTS.

Kennedy L.J.

evidence referring to an earlier period, that is to say, October 21, 1908, at which the present respondents successfully contended before him that the workman's incapacity had ceased, and he ordered and awarded that the compensation payable under the recorded agreement between the parties under the Act should be ended as from October 21, 1908, because, as he found upon the evidence, the incapacity had ceased on that date. I do not suggest that his finding of fact was not perfectly correct; but it appears to me that, the form of the employers' application to review being identical in this and in the *Upper Forest Case* (1), we ought, in conformity with that case, to hold that this portion of the order and award under appeal cannot be allowed to stand without alteration. Speaking for myself, I am not deciding, as it is not necessary to decide, that, if the application to review in clear and express terms had asked for a diminution or termination of payment from October 21, 1908, it would not have been proper for the learned judge under the statute to hear evidence and to award as to the workman's capacity on October 21, 1908. I am inclined to think that such a course may be followed. We have only to deal here with the case as it came before him on the application of the employers as that application was framed, in a general form and without express reference to any particular date; and it appears to me, as I have said, that, having regard to the decision in the *Upper Forest* judgment (1), we ought to order, on this appeal, that the order and award of the learned county court judge should be varied by omitting so much of that order and award as directed that the weekly compensation should be terminated from October 21, 1908, and by substituting a declaration of termination as from the date of the application, which is, I think, March 4, 1909. But I do not think that our order would be just to the respondents if it stopped there. If in truth the workman had ceased to be incapable on October 21, 1908, or at any other date between October 21, 1908, and the application to review, he clearly ought not to be allowed, by virtue of the recorded memorandum, which operates as a judgment, and under which, therefore, unless stayed, execution may issue, to enforce

(1) Ante, p. 631.

a payment of compensation in respect of a period subsequent to the termination of his incapacity. At present a "stay" granted by the county court judge upon the applicant's application to record the agreement exists; and I think that the end which appears to me to be just could be attained if our order on this appeal, after directing the variation I have stated, should go on to declare that this variation is without prejudice to the right of the present respondents, if any application is made in the county court to remove the stay of execution ordered on March 4 last, to prove upon the hearing of such application, and in answer thereto, that the applicant's incapacity had in fact ceased on October 21, 1908, or on any other date after October 21, 1908, and before the date of the respondents' application to review.

The order proposed by the Master of the Rolls will, I think, meet the justice of the case. It meets the possibility of a contention, not, I understand, put forward by the appellant, that the stay already granted does not remain in force.

After some discussion as to the costs it was arranged that the matter should be mentioned on July 1. On that date the Court ordered that there should be no costs of the appeal.

Appeal allowed.

Solicitors: *Pattinson & Brewer; Watson, Sons & Room.*

H. B. H.

C. A.
1909
June 17;
July 16.

[IN THE COURT OF APPEAL.]

WING *v.* LONDON GENERAL OMNIBUS COMPANY.

Nuisance—Negligence—Motor Omnibus—Accident to Passenger—Doctrine of "res ipsa loquitur."

A motor omnibus belonging to the defendants, in which the plaintiff was a passenger, "skidded" upon a road the surface of which was greasy from rain, and ran into an electric light standard, and the plaintiff was in consequence injured. At the trial of an action brought by the plaintiff in the county court in respect of the injury so occasioned to her, there was no evidence given for the plaintiff of anything (beyond the above-mentioned facts) in the nature of negligence on the part of any servant of the defendants in the driving or management of the omnibus, or of any defect in the construction or condition of the particular omnibus, or that motor omnibuses generally were of such a character as to constitute a nuisance, but it was apparently assumed, and not disputed by the defendants, that motor omnibuses, however well constructed, had a tendency to skid when the road was greasy. The defendants called no witnesses except as to quantum of damage. The case was left to the jury, who found a verdict for the plaintiff, but, subsequently, the county court judge, being of opinion that there was no evidence for the jury of liability on the part of the defendants, entered judgment for them:—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that, upon the above-mentioned facts, there was no evidence for the jury that the defendants' allowing the motor omnibus to run under the circumstances constituted a nuisance, and therefore the decision of the county court judge was correct.

By Buckley L.J.: Upon the facts there was evidence of negligence on the part of the defendants in allowing the motor omnibus to run under the circumstances.

Question, when the doctrine of "res ipsa loquitur" applies, discussed.

Appeal from the judgment of a Divisional Court (Bigham J. and Walton J.) reversing the decision of a county court judge in favour of the defendants, and entering judgment for the plaintiff.

The facts appear from the head-note sufficiently to render the arguments intelligible, and are stated fully in the judgments.

June 17. *Simon, K.C.*, and *Ernest B. Charles*, for the defendants. The county court judge was right in holding that there was no evidence of liability on the part of the defendants to go

to the jury. No case was really made of negligence on the part of those in charge of the omnibus.

[VAUGHAN WILLIAMS L.J. referred to *Carpue* v. *London, Brighton, and South Coast Ry. Co.* (1)]

The finding of the jury was not founded on any negligence of defendants' servants, but on the character of the vehicle. This case differs entirely from cases in which a passer-by, or some one's property in the street, has been injured through the wheels of a motor omnibus skidding or side-slipping. The question here is not whether as regards outsiders a motor omnibus is an improper kind of vehicle, or a nuisance. A passenger in a public vehicle accepts the risks that are well known to be necessarily incidental to the particular kind of vehicle, or mode of carriage, by which he elects to be carried. All that the carrier's duty extends to, or that he is to be assumed to warrant, is that, apart from defects undiscoverable by the exercise of reasonable skill and care, the vehicle shall be reasonably well appointed and sufficient as one of the class to which it belongs. Horses which are ordinarily quiet and surefooted do sometimes bolt, or slip, without any fault on the driver's part. It could not be suggested that the proprietors of a horse-drawn omnibus warrant that their horses will never bolt or slip, or that there is a breach of their duty towards a passenger in the omnibus, if he is injured through the horses bolting or slipping without any negligence on the part of any of the proprietors' servants. Similarly, it is notorious that motor omnibuses will occasionally skid or side-slip, without negligence on the part of any servant of the proprietors, when the roadway is greasy, but it cannot reasonably be said that it is a breach of warranty or of a duty towards the passenger by their proprietors if this happens. The passenger must be taken to be aware of this characteristic of the kind of vehicle he selects and to accept the risk. It would be unreasonable to say that there was negligence on the part of the company's servants because, directly a shower came on, and the road became a little wet, they did not stop the omnibus, wherever it might be, and turn all the passengers out in the rain. The duty towards the passenger must be measured with regard to

(1) (1844) 5 Q. B. 747.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

the particular class of vehicle he selects. Different classes of vehicles with different qualities ply in the streets for hire. The proprietor of one class of vehicle cannot be assumed to warrant that his vehicle has all the good qualities of another class of vehicle. Suppose in the future locomotion by aerial vehicles becomes common; could a passenger in such a vehicle complain that the proprietor was guilty of a breach of duty or warranty towards him, if, a very high wind springing up, the aerial vehicle was carried against a building, without any fault of those in charge of it, whereby the passenger was injured? The question does not depend on the knowledge of the particular passenger with regard to the risks incidental to the particular kind of vehicle; he must be taken to have the knowledge on the subject which is common to the generality of people. It may be admitted that motor omnibuses, however well constructed, have a tendency to skid when the road is greasy, but there was no evidence whatever here that they have that tendency to such an extent, or are so unmanageable in that condition of things, as to constitute a nuisance, and the jury had no right to assume such to be the case without evidence. [They cited *Readhead* v. *Midland Ry. Co.* (1)]

Moyses and *Eric Dunbar*, for the plaintiff. There was evidence for the jury of negligence on the part of the defendants in allowing the motor omnibus to run under the circumstances, and, that being so, the question was for them, and the Court will give effect to their verdict. The roadway was in a greasy state, and there was in effect an admission of the unfitness of motor omnibuses for traffic in the streets, by reason of their tendency to skid and side-slip, when that condition of things prevails. It was for the jury to say whether, under the circumstances, the motor omnibus ought to have been sent out, or allowed to go on running, or whether the risks thereby involved did not outweigh any inconvenience which might be caused to the public by withdrawing it from traffic. No witnesses were called on the part of the defendants to give any account of the matter, or to explain how the accident happened. In the absence of any such explanation, the doctrine res ipsa loquitur

(1) (1867) L. R. 2 Q. B. 412; (1869) L. R. 4 Q. B. 379.

applies. The plaintiff is not an expert in such matters, and cannot in the nature of things give any sufficient explanation of the causes of the accident. Her case is that the fact that the omnibus ran into the electric light standard is one which threw the onus of giving some explanation of it on the defendants; and that, in the absence of sufficient explanation on their part, it is some prima facie evidence, either that the driver was negligent, or that the vehicle was in some respect defective, or an improper vehicle to be allowed to run, having regard to the condition of the roads. If the hypothesis that the driver was negligent is excluded under the circumstances of the case, the inference must be that the motor omnibus was so unmanageable and of such a nature as to constitute a nuisance in the then state of the roads. [They cited *Hyman* v. *Nye* (1); *The Lancashire* (2); *Isaac Walton & Co.* v. *Vanguard Motorbus Co.* (3); *Gibbons* v. *Vanguard Motorbus Co.* (4)]

Simon, K.C., for the defendants, in reply. At the trial the case started by the plaintiff was that there was some negligence on the part of the driver; and, if that case had been persevered with, there might possibly have been some ground for saying that the onus of proving that he was not negligent was thrown on the defendants; but that case was dropped, and it was then sought to make out that the vehicle in question was a nuisance. The onus of shewing that was on the plaintiff. It was not suggested that the particular vehicle was any worse than others of its class, or that there was anything abnormal in the state of the weather or the road. What was relied upon was the, no doubt, undisputed fact that motor omnibuses are somewhat more liable to side-slip than some other kinds of vehicle. But that is not per se evidence that they are a nuisance. It was not really put forward at the trial that under the circumstances the omnibus ought to have been stopped, and the passengers turned out, and that the fact that this was not done constituted negligence on the part of those in charge of the omnibus. *Hyman* v. *Nye* (1) was a totally different case from the present. It was not a case of a passenger in a public vehicle, but one in

(1) (1881) 6 Q. B. D. 685.
(2) (1874) L. R. 4 A. & E. 198.
(3) (1908) 25 Times L. R. 13.
(4) (1908) 25 Times L. R. 14.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

which a jobmaster contracted to let a vehicle to the plaintiff, and let to him a defective vehicle.

Cur. adv. vult.

July 16. VAUGHAN WILLIAMS L.J. read the following judgment: —This is a case of some importance. The plaintiff (an artificial flower maker) claims 40*l.* damages for personal injuries sustained by her while travelling as a passenger in a motor omnibus of the defendants, from Hornsey Rise to Hammersmith, and alleges that the personal injuries sustained by her were caused (1.) by the negligence of the defendants' servant, when in charge of a motor omnibus, in so improperly managing it as to cause or allow it to come into collision with an electric light standard, and to occasion such fright and alarm to the plaintiff that in escaping from the said omnibus she was seriously injured; (2.) alternatively the plaintiff claims a like amount by reason of the negligence of the defendants in placing upon the highway a dangerous machine which was liable to become uncontrollable in certain slippery or other conditions of the roadway (which conditions existed at the time the aforesaid injuries were sustained) and thereby creating a nuisance. At the close of the evidence for the plaintiff, counsel for the defendant company submitted there was no evidence of negligence. A police officer spoke to the road being in a greasy state at the time, and to the driver and conductor having stated that the omnibus was going about five miles an hour; and the plaintiff proved that as the omnibus was going into Caledonian Road it came into collision with an electric light standard, and that she, in escaping or alighting from the said omnibus, was seriously injured. It was, the county court judge said in his judgment, part of the plaintiff's case that the collision was due to skidding, and the defendant company admitted (while denying negligence) that such was the case. The county court judge declined to leave to the jury the first of the plaintiff's alternative claims, namely, the claim based on negligent management by the defendants' servant in driving the omnibus, and the plaintiff's counsel assented to that course, so that there was nothing left for the jury to consider except the question arising on the second alternative claim, and the

question whether the plaintiff was guilty of contributory negligence causing the accident in getting out as and when she did. The learned judge asked the jury whether the defendant company were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the roadway was in a slippery, greasy state at the time, and of the known tendency of such vehicles as motor omnibuses to skid on greasy surfaces, and also asked the question as to contributory negligence by the plaintiff.

The jury found that the defendant company was negligent in allowing their omnibus to run when the road was in a slippery state, and that the plaintiff was not guilty of "contributory negligence" in getting out as she did, and assessed the damages at 34*l.* 11*s.* The county court judge reserved entering judgment for the purpose of considering whether he was right in leaving any question of negligence to the jury, and came to the conclusion that there was no evidence of negligence on the part of the defendant company in allowing their motor omnibus to run when the road was in a slippery condition, and entered judgment for the defendant company. In the course of this judgment the county court judge stated that it was not suggested at the trial that the defendant company used an imperfectly constructed or wrongly designed vehicle, or that the company had omitted to use any known contrivance or take any proper precaution to prevent "skidding."

From this judgment of the county court judge entering judgment for the defendant company there was an appeal to the King's Bench Division, which reversed the judgment of the county court judge, and ordered judgment to be entered for the plaintiff for the sum assessed by the jury, with costs. Bigham J., in delivering his judgment in the King's Bench Division, begins by stating that it is not an abnormal thing for a road to be greasy, and then says that, if it appears that a motor omnibus, using a road when the road is in a normal condition, behaves in an eccentric way, there must be something wrong about the car itself, and that people ought not to send out vehicles which (the highway being in an ordinary condition in which you may expect to find it) are not controllable. Here the highway was in

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Vaughan Williams L.J.

a normal condition, and, the motor omnibus being driven along it, and being driven (for this purpose I will assume) quite carefully, the driver is not able to control its movements. I think, says Bigham J., that those circumstances are quite sufficient to justify a jury in saying that it is a negligent thing to send that motor car out. And Walton J. deals with the case in much the same way, after stating that the learned county court judge, taking the view that he could not say that there was general evidence of negligence because the omnibus might have skidded in that way, a fault not in any way due to the driver, left the question to the jury whether the defendants were negligent. Even in that view, even assuming that the accident was caused by skidding, and that the driver could not control the omnibus, and so prevent it, Walton J. concludes this part of the case by saying: "Upon that the jury have found for the plaintiff, and upon the decisions which have been given I do not see how that verdict can be impeached unless Mr. Simon's argument must prevail, namely, that the plaintiff, when she went into this omnibus, took the risk of the omnibus skidding." The learned judge then goes on to say: "No doubt, if she knew that omnibuses will skid, notwithstanding everything that can be done to prevent them,—if she had known that in the sense that the omnibus was not a safe omnibus for her to travel in, and had taken that risk, of course she could not sue; but whether she knew that or whether she did not take that risk is a question of fact upon which the burden is rather on the defendants, who set up that she did take that risk; but it seems to me that there was nothing to shew that the plaintiff knew anything at all about the tendency of the omnibus to skid, and that the verdict cannot be disturbed." I think Walton J. must have meant here the tendency of "such an omnibus," to wit, a motor omnibus, to skid.

I will first inquire into the question as to how far the decided cases justify the conclusion that the mere happening of the accident to a passenger in a public vehicle makes a prima facie case against the owners of an omnibus plying for passengers in the public streets. Generally in a case charging negligence, as in every other case, it is for the plaintiff to prove his case—that

is, to prove negligence of a duty owing to him—and the mere fact of an accident is not generally prima facie evidence of negligence; but, if the cause of the accident be shewn, this may or may not be prima facie evidence, according to its nature: see *Simpson and Wife* v. *London General Omnibus Co.* (1) The cause of the accident in the present case was the skidding of the motor omnibus; there was no actual evidence that motor omnibuses (however well constructed) will occasionally skid when roads are slippery, which, as Bigham J. says, is a normal condition of roads; but, on the other hand, the whole case was conducted on the assumption that, when a road is in a slippery condition, a motor omnibus has a tendency to skid, whatever its construction may be, and there was no suggestion by the plaintiff that this omnibus was ill-constructed or omitted any known means of preventing skidding. Nevertheless, the defendants knew of the tendency of motor omnibuses to skid, and, knowing this, put a motor omnibus on the streets to ply for passengers. Mr. Simon admitted that motor omnibuses, however well constructed, have a tendency to skid, and that this was well known, and that it must be assumed that the plaintiff knew, but there was in fact no evidence that she knew. His admission did not go beyond this.

Before I read the rest of my judgment I want to say that I have written this final part of my judgment for this reason: The materials we had for knowing what took place exactly at the trial are very scanty, and under those circumstances I have thought it worth while, at the expense, it may be, of some repetition of the facts that I stated at the beginning of the judgment, to see exactly what the course of the trial was and what the actual facts were as to the defendants' liability. I will begin with the facts of this case and the course of the trial as appearing from the judge's notes and the statements in his judgment. It appears from the evidence of a police constable who did not see the accident that the driver said, "Hind part of omnibus skidded when avoiding other vehicles, which caused damage." The conductor said the same. All the rest of the evidence went only to the injuries sustained by the plaintiff and the pecuniary and other damage.

(1) (1873) 42 L. J. (C.P.) 112.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Vaughan Williams L.J.

The counsel for the defendant company submitted that there was no evidence of negligence, or that the accident happened to the plaintiff as a direct consequence of the accident to the lamp post. The defendant company called no evidence, except medical evidence by Dr. Abbott. Then, looking at the judgment of the deputy county court judge, I find that he begins his judgment by referring to the submission by counsel for the defendant company that there was no evidence of negligence which ought to be left to the jury. He then recapitulates the evidence of the police officer, not quite in the words of his notes, for he adds that this witness spoke to the road being in a greasy state at the time, and adds to his statement that the driver said that the hind part of the omnibus skidded when avoiding other vehicles, and that the conductor said the same, a statement that the driver and conductor admitted that the omnibus skidded while going about five miles an hour and while the driver was trying to avoid two other vehicles. The county court judge goes on to say that it was in fact part of the plaintiff's case that the collision with the lamp post was due to skidding, and that the defendant company admitted (while denying negligence) that such was the case, and that it was due to the state of the road. The learned judge declined to leave any question of negligent driving to the jury—and it is admitted that the counsel for the plaintiff assented to this course, and that he cannot complain that this issue was not left to the jury—but did leave to the jury the question "whether, under the head (2.) of the particulars, the defendant company were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the road was in a slippery state at the time and of the known tendency of such vehicles as motor omnibuses to skid on greasy surfaces." The jury, the learned judge says, found "that the defendant company was negligent in allowing their motor omnibus to run on the road when it was in a slippery state." I observe that neither the question left to the jury nor their finding coincides exactly with the words of the second head of particulars, which are: "II. Alternatively, the plaintiff claims a like amount by reason of the negligence of the defendants in placing on the highway a dangerous machine which was liable to become uncontrollable in

certain slippery or other conditions of the roadway (which conditions existed at the time the aforesaid injuries were sustained) and thereby creating a nuisance." The county court judge reserved his judgment, and after consideration delivered a written judgment to the effect following: "I think I ought to enter judgment for the defendant company. The duty of a carrier of passengers is laid down in the case of *Readhead* v. *Midland Ry. Co.* (1) as being the duty of taking every precaution to procure a vehicle reasonably sufficient for the journey which it is to assist in performing, and I do not think there was any evidence in the present case that the company had not performed that duty." The learned judge then adds a statement of fact as to the course of the trial. He says: "It was not suggested that the defendant company used an imperfectly constructed or wrongly designed vehicle, or that the company had omitted to use any known contrivance or take any proper precaution to prevent skidding, and, apart from the fact that in common with all motor-drawn vehicles there is a greater tendency for motor omnibuses to skid or slip on greasy roads rather than for other classes of vehicles, I do not think there was any evidence of negligence on the part of the defendant company in allowing their motor omnibus to run when the road was in a slippery condition." There is some slip in the use of the word "drawn." I think "propelled" is the right word, and not "drawn," strictly speaking.

I have read this part of the judgment in the county court at length so as to ascertain what really was the question with which the jury were dealing when they found that the company was negligent in allowing their omnibus to run when the road was in a slippery state. I have not got the summing up before me, and can only infer its substance from the words of the judgment of the county court judge which I have quoted; but I do not think that the jury considered any question as to defects in construction or design of this particular omnibus, but assumed the fact that motor omnibuses and other vehicles propelled by motor power had a tendency to skid on slippery roads, and asked themselves whether it was negligence on the part of the defendant company,

(1) L. R. 2 Q. B. 412; L. R. 4 Q. B. 379.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Vaughan Williams L.J.

who had knowledge of this tendency to skid, to place on the road a machine liable to become uncontrollable in slippery conditions of the road, and thus a nuisance.

If this was the question which the jury presented to themselves and answered, I think that the fact that the defendant company placed such a carriage on the road to ply for passengers was no evidence of negligence or nuisance, having regard to the fact that motor omnibuses have been running in the streets of the metropolis for several years. No doubt the mere fact of the accident may be prima facie evidence of negligence when the accident itself is evidence of a defect in the particular carriage, as was the case in *Christie* v. *Griggs* (1) and *Sharp* v. *Grey* (2); but I do not think that an accident resulting from the tendency of motor omnibuses, however well constructed and designed, to skid is any evidence of negligence or of nuisance. So, with all deference to the Divisional Court, especially as constituted, I think this appeal must be allowed. I do not think that the knowledge or want of knowledge of the plaintiff of the tendency of motor omnibuses to skid affects the event of this action.

FLETCHER MOULTON L.J. read the following judgment:—This is an appeal from the judgment delivered by the judge of the county court of Middlesex held in Clerkenwell in an action in which the plaintiff sued for damages resulting from an accident which occurred while she was a passenger in a motor omnibus belonging to the defendants.

The plaintiff's claim was based on two alternative grounds—(1.) that the defendants' servants, whilst in charge of the motor omnibus, were guilty of negligence causing the accident, and (2.) that the motor omnibus was itself a dangerous machine, and that the defendants were liable for having placed it upon the roadway, thereby creating a nuisance, whereby the plaintiff suffered damage.

The evidence given at the trial as to the nature and circumstances of the accident was meagre in the extreme. The plaintiff deposed to nothing more than that she was a passenger in the omnibus, and that she heard breaking of glass, and knew that the

(1) (1809) 2 Camp. 79. (2) (1833) 9 Bing. 457.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Fletcher Moulton L.J.

omnibus had hit something, and that she heard something fall. She tried to get out, and, in so doing, hurt her foot. No other witness was called who was present at the time of the accident, but evidence was given on her behalf by a police constable, who came up afterwards, and proved that an electric standard had been broken in the accident, and that the hind step of the motor omnibus had been slightly bent. No other damage had been caused to the omnibus. He also proved that the road was in a greasy state at the time by reason of rain that had fallen during the day. He was asked by the plaintiff's counsel as to certain admissions made to him at the time by the driver and conductor of the omnibus, and proved that they stated to him that the hind part of the omnibus skidded, when going about five miles an hour, while the driver was trying to avoid two other vehicles. The defendants called no evidence except as to the quantum of damage. At the end of the plaintiff's case, counsel for the defendants submitted that there was no evidence, either of negligence or of nuisance, to go to the jury, and the learned judge gave partial effect to that contention by withdrawing from the jury the question of negligence in the driving or management of the car. The plaintiff did not take exception to this by giving a cross notice of appeal, nor was the point raised before the Divisional Court, and it is not, in my opinion, open to her counsel to raise it now. But, apart from this, I am of opinion that the learned judge was right in so doing. There was no evidence whatever that the accident was due to negligence on the part of the servants of the defendants who were in charge of the omnibus, unless the mere occurrence of the accident amounts to such evidence. In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of res ipsa loquitur applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a prima facie responsibility for what happened. An

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Fletcher Moulton L.J.

accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control. Hence the fact that an accident has happened either to or through a particular vehicle is by itself no evidence that the fault, if any, which led to it was committed by those in charge of that vehicle. Exceptional cases may occur in which the peculiar nature of the accident may throw light upon the question on whom the responsibility lies, but there is nothing of the kind here. The collision with the electric standard was due to the omnibus skidding, and, if we are to give any weight to the admissions made by the defendants' servants which were proved in evidence in chief as part of the plaintiff's case, that skidding was due to difficulties in avoiding other vehicles. There is certainly no evidence to negative such a probable explanation of what actually happened, and it is impossible to say that this points to negligence, or that it establishes that any negligent act of the defendants' servant was the cause of the accident. I am therefore of opinion that the learned judge acted rightly in withdrawing from the jury the issue as to the accident being due to negligence of the defendants' servants in the driving or management of the vehicle.

The learned judge, however, left to the jury the other question, namely, whether the defendants were guilty of negligence towards the plaintiff in allowing their motor omnibus to run, having regard to the fact that the roadway was in a slippery or greasy state at the time, and the known tendency of such a vehicle to skid on greasy surfaces. The jury found for the plaintiff on this issue. Subsequently, however, the judge entered judgment for the defendants on the ground that there was no evidence to support that finding. The question for our decision is whether he was right in so doing.

It is somewhat difficult to ascertain the exact nature of the issue left to the jury, but a careful examination of the language of the learned judge has satisfied me that it referred, and would be understood by the jury to refer, to acts of the defendant company other than acts of their servants in charge of the

vehicle. The conduct of the driver or conductor in continuing to run was covered by the first issue, which the learned judge rightly refused to leave to the jury. The second issue referred therefore to the conduct of the defendants, as a company, in allowing their motor omnibuses to run when the roads were in a greasy state; in other words, it related to the alternative claim based on nuisance. It is true that in the question to the jury the word "negligence" appears. But it is also used in the count in the pleadings based on nuisance. In neither case is it rightly used, because "nuisance" and "negligence" are different in their nature and consequences. But the so-called negligence of the defendants, in allowing their omnibus to run when the roads were in a greasy state, must mean that they ought not to have done so because, when so run, the omnibus constituted a nuisance. All else to which it can refer must be covered by the first issue, which has already been disposed of.

This cause of action is of the type usually described by reference to the well-known case of *Rylands* v. *Fletcher*. (1) For the purposes of to-day it is sufficient to describe this class of actions as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger. In such a case should accident happen therefrom, even through the intervention of an event for which he is not responsible, and without negligence on his part, he is liable for the damage. The best known cases of this type are associated with the use by a person of land belonging to him, as when a man collects a large volume of water on his land, or carries on some dangerous manufacture there. But I have no doubt that analogous causes of action exist when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic. If a man places on the streets vehicles so wholly unmanageable as necessarily to be a continuing danger to other vehicles, either at all times or under special conditions of weather, I have no doubt that he does it at his peril, and that he is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle. It is not necessary to

(1) (1868) L. R. 3 H. L. 330.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

Fletcher Moulton L.J.

decide whether a state of things which would entail such consequences might not also be stopped by legal process on the ground that putting or keeping the vehicles on the road was a nuisance. I incline to the opinion that such is generally, though not universally, the case. But the whole of the facts with regard to the vehicles, and the danger to which they give rise, may not be known to the public, or it may be that no member of the public feels sufficiently personally interested to proceed against the owner. The doctrine of *Rylands* v. *Fletcher* (1), as applied to such cases, amounts, in my opinion, to this—that, if there be such a nuisance, the fact that no one has chosen to seek by legal process the complete remedy of stopping it does not interfere with the liability of the author of the nuisance to pay for all damages occasioned thereby to any member of the public.

But it is for the plaintiff to prove that the defendant has committed a nuisance, and this must be shewn by proper evidence. In the present case there was none. No witness was called to prove either that this particular motor omnibus was or that motor omnibuses generally were unmanageable, or dangerous, to such an extent as to constitute a nuisance in the eye of the law, or to call into play the doctrine of *Rylands* v. *Fletcher*. (1) For the reason I have already given, the mere occurrence of the accident is not evidence of negligence, much less of the more difficult issue of "nuisance," and beyond this there was no relevant evidence of any kind. It was suggested before us that the plaintiff's case was assisted by some admissions made by the defendants' counsel. Neither the note of the learned judge, nor his judgment, contains any record of any such admission. No doubt it was present to the minds of all concerned in the case in the county court, as it was at the hearing of this appeal, that self-propelled vehicles at times slip on roads when they are greasy. But this fact is not evidence that they are so unmanageable as to constitute a nuisance. All vehicles have their defects. Those that are drawn by horses are liable to cause or suffer accidents through the horses becoming frightened, or slipping and falling. If they are four-wheeled vehicles, such as horse-drawn omnibuses, they are liable to swerve and skid on greasy pavements. Self-propelled

(1) L. R. 3 H. L. 330.

vehicles have the advantage that there are no horses that can be frightened, or can fall. Such vehicles are also under more complete mechanical control, and can ordinarily be pulled up in a much shorter distance. On the other hand, they are probably more liable than horse-drawn vehicles to skid, if the road be greasy, and especially if they are required to turn suddenly. But there is nothing in the case which makes it incumbent on the Court to balance the advantages and disadvantages of the several types of vehicle, or to say which on the whole is the safest. There is nothing which points to any of them being so unsuitable for use in street traffic as to constitute a nuisance, and no jury is entitled mero motu to pronounce that a vehicle such as a motor omnibus is a nuisance without proper evidence. Thousands of motor omnibuses travel in the streets of London in all weathers, and they carry a considerable portion of the passenger traffic of London. They are recognized by the authorities, and duly licensed to carry passengers. The number of car miles annually run by them must amount to many hundreds of thousands, if not millions. The number of accidents which occur must be small compared with the extent of their use. In the absence of evidence the jury could not properly pronounce motor omnibuses generally to be unfit for street traffic, and a nuisance, and there was no attempt to shew that this motor omnibus was not a properly constructed motor omnibus. The judge acted rightly, therefore, in declining to accept the verdict of the jury on this issue.

Thus far I have dealt with the question of nuisance as though the plaintiff had been a member of the public using the public highway, and injured by a vehicle travelling thereon. But in fact the plaintiff was a passenger by the motor omnibus. This fact no doubt alters the rights of the plaintiff, but not in any way to the advantage of her case. She cannot complain of matters naturally incidental to traffic in motor omnibuses, for she voluntarily elected to become a passenger by one of such vehicles. Inasmuch, therefore, as there was no negligence in the management of the vehicle, she must, in order to establish her case, prove that the vehicle was defective. As I have already said, there was no evidence in support of such an allegation. I am of opinion,

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

therefore, that the decision of the Divisional Court in allowing the appeal from the judgment of the county court judge was wrong, and that this appeal must be allowed, and that judgment must be entered as directed by him.

BUCKLEY L.J. read the following judgment:—My judgment is that the Divisional Court are right and that this appeal should be dismissed. There is no difference of opinion, I think, among the members of the Court as to the law. The difference arises upon the facts.

The principal difficulty I feel lies in ascertaining exactly what were the facts upon which the decision proceeded. Even the finding of the jury is nowhere recorded in so many words. Some material facts were admitted at the trial, but there is no note of what the facts admitted were. I have to ascertain both the one and the other as best I can from the judgment of the learned county court judge and from Mr. Simon's admission before us at the bar. Mr. Simon stated that it was admitted at the trial that this motor omnibus was one of a class which will skid and fall out of control when running upon a pavement slippery with recent rain. From the learned judge's judgment I find that the defendant company admitted (while denying negligence) that the collision was due to skidding, and that it was due to the state of the road. The jury had before them, therefore, these facts by way of admission, and the further fact that there was here a vehicle which in ordinary circumstances confined itself to the roadway, but under these circumstances knocked down a permanent structure on the pavement without (upon the facts of this case) negligence in the driver. Lord Alverstone in *Isaac Walton & Co.* v. *Vanguard Motorbus Co.* (1) commented upon a similar state of facts. I agree with him in saying that that last matter is evidence upon which a jury might come to the conclusion that there was negligence. In the present case it would be negligence in employing the vehicle under the circumstances. These being the facts upon the question of negligence, the learned judge discriminated between two things, negligence in the driving or management of the omnibus

(1) 25 Times L. R. 13.

and negligence in allowing the omnibus to run at all, having regard to the fact that the roadway was in a slippery, greasy state at the time and the fact of the known tendency of such a vehicle as this to skid on greasy surfaces. Upon the former he thought there was no evidence of negligence which he ought to leave to the jury. On the latter he left it to the jury to say whether the defendant company were guilty of negligence in allowing their motor omnibuses to run under those circumstances.

The jury found that the company were negligent in allowing their motor omnibuses to run under those circumstances. The motion to the Divisional Court was to have judgment entered for the plaintiff on the ground that the county court judge was wrong in law in holding that there was no evidence to support the finding of the jury. In my opinion he was wrong. There was evidence to support it, and the finding of the jury upon the fact ought to stand.

There is no point made here of faulty construction of the vehicle, nor, having regard to the course which the case took, any assertion that in the driving of the omnibus there was negligence. The negligence found I understand to have been this, that the defendant company offered to the plaintiff for her conveyance a vehicle which was safe in certain conditions of the road, but became dangerous in other conditions of the road, and that they continued to run it after the latter conditions had arisen. In *Hyman* v. *Nye* (1) Lindley J., as he then was, was discussing, I agree, negligence by the employment of a vehicle defective in construction, but I think his language is in point of law equally applicable to negligence in user under circumstances when user has become dangerous. A person who lets out carriages, he says, "is an insurer against all defects which care and skill can guard against." See also *Christie* v. *Griggs*. (2) This is true, I think, of defective or improper user which care and skill can guard against. His duty is, I think, to use the carriage in such proper manner and under such proper circumstances as care and skill can insure, and if he can prove that the accident was not preventible by any care or skill in user he is not liable; "but no proof," says Lindley J., "short of this

(1) 6 Q. B. D. 685. (2) 2 Camp. 79.

C. A. 1909

WING v. LONDON GENERAL OMNIBUS COMPANY.

will exonerate him." It was, in my opinion, for the jury here to say whether this vehicle, being one which in certain conditions of the road would skid and become dangerous, ought to have been used after the road had got into that condition. They have found that it ought not, and for this negligence, in my opinion, the defendants are liable.

Appeal allowed.

Solicitors for plaintiff: *Alfred Slater & Co.*

Solicitors for defendants: *Joynson-Hicks, Hunt, Moore & Cardew.*

E. L.

C. A. 1909

May 26; *June* 24; *July* 16.

[RAILWAY AND CANAL COMMISSION AND COURT OF APPEAL.]

GREAT WESTERN RAILWAY COMPANY *v.* BARRY RAILWAY COMPANY.

Railway—Arbitration—Jurisdiction of Railway and Canal Commission—Differences between Railway Companies—Agreement confirmed or authorized by General or Special Act—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 8—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 15—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 87.

In order that an agreement between railway companies may be "confirmed or authorized" by a general or special Act within the meaning of s. 15 of the Railway and Canal Traffic Act, 1888, it is not necessary that the agreement should be specifically confirmed or authorized by statute.

By s. 30 of the Barry Dock and Railways Act, 1891, running powers over a branch line belonging to the Great Western Railway Company were conferred upon the Barry Railway Company, and by s. 34 of the same Act it was provided that "the terms conditions and regulations on and subject to which the company" [the Barry Railway Company] "shall be entitled to run over and use any part of the Great Western Railway under the powers of this Act and the stations and works connected therewith and the tolls or other consideration to be paid in respect of the same shall if not agreed upon between the company and the Great Western Railway Company be from time to time determined in manner provided by the Regulation of Railways Act 1873 as amended by the Railway and Canal Traffic Act 1888 with respect to differences between railway companies."

In pursuance of the powers conferred upon the companies by the

above-mentioned Act and by the provisions of the Railways Clauses Consolidation Act, 1845, s. 87, an agreement was made between the companies in relation to the user by the Barry Railway Company of the aforesaid branch line of the Great Western Railway Company. By a clause in this agreement it was provided that all questions and differences arising thereunder should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, or any subsisting statutory modification thereof. Differences having arisen under the agreement, the Great Western Railway Company applied to the Railway Commissioners under s. 8 of the Regulation of Railways Act, 1873, and s. 15 of the Railway and Canal Traffic Act, 1888, to decide those differences:—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that, although the provisions of the agreement had not been confirmed or specifically authorized by statute, they came within the terms "provisions of any agreement confirmed or authorized by any such Act" in s. 15 of the Railway and Canal Traffic Act, 1888, and therefore the Railway Commissioners had jurisdiction under s. 8 of the Regulation of Railways Act, 1873, to determine the before-mentioned differences.

By Buckley L.J.: Inasmuch as the provision for arbitration in the agreement was not confirmed or authorized by statute, the case did not fall within s. 15 of the Railway and Canal Traffic Act, 1888.

ARGUMENT before the Railway Commissioners of point of law raised on the pleadings.

The material facts stated in the application to the Commissioners were as follows:

By s. 5 of the Barry Dock and Railways Act, 1891 (54 & 55 Vict. c. clxxxiv.), the defendants, the Barry Railway Company, were authorized to make and maintain certain new railways therein described. Two of the railways so authorized were designed to connect the railway of the Taff Vale Company with a branch railway of the applicants, the Great Western Railway Company, known as the Riverside Branch. Another of the new railways was to be an extension of the Riverside Branch. By s. 30 of the Barry Dock and Railways Act, 1891, running powers over the Riverside Branch and any widenings, extensions, or improvements thereof were conferred upon the defendants.

By s. 34 of the Barry Dock and Railways Act, 1891, "The terms conditions and regulations on and subject to which the company shall be entitled to run over and use any part of the Great Western Railway under the powers of this Act and the

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

stations and works connected therewith and the tolls or other consideration to be paid in respect of the same shall if not agreed upon between the company and the Great Western Railway Company be from time to time determined in manner provided by the Regulation of Railways Act 1873 as amended by the Railway and Canal Traffic Act 1888 with respect to differences between railway companies."

In pursuance of the powers conferred upon the applicants and the defendants by the Barry Dock and Railways Act, 1891, and by the provisions contained in the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), an agreement was made between the applicants and the defendants dated June 29, 1893, in relation to the user by the defendants of the Riverside Branch and the railways of the applicants adjacent thereto.

Articles 17 and 19 of the agreement were as follows:

"17. This agreement shall be in perpetuity but the terms shall be subject to revision at the expiration of seven years from the date hereof and also at the expiration of every succeeding period of seven years on six months' notice being given by either company previous to the expiration of any such septennial period."

"19. All questions and differences arising under this agreement shall be determined by arbitration in manner provided by the Railway Companies Arbitration Act 1859 or any subsisting statutory modification thereof and the arbitrators or arbitrator shall have power to determine the amount of damage which either of the companies parties hereto may have sustained from the breach by the other of them of any of the clauses or provisions of this agreement."

Differences arose between the applicants and defendants which the applicants alleged were to be referred to and settled by arbitration under article 19 of the agreement.

The application concluded as follows: "The applicants accordingly apply to the Court under the Regulation of Railways Act, 1873, s. 8, and the Railway and Canal Traffic Act, 1888, s. 15 (1), to decide the differences which have arisen between

(1) Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 8: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is,

them and the defendants, no arbitrator having in any general or special Act been designated by his name or the name of his office and no standing arbitrator having been appointed under any general or special Act."

By their answer the defendants admitted the facts above set out and that the differences that had arisen between them and the applicants were differences arising under the agreement of June 29, 1893, which were to be determined by arbitration, as provided by the agreement, in manner provided by the Railway Companies Arbitration Act, 1859, and they submitted that the Court had no jurisdiction in the matter.

An order was made that the point of law raised by the defendants in their answer be set down for hearing and disposed of before the hearing of the application.

May 26. *Sir R. Finlay, K.C.*, and *Joseph Shaw*, for the defendants. The question whether the Court has jurisdiction to entertain the application turns upon the true construction of s. 15 of the Railway and Canal Traffic Act, 1888. The meaning of the section is that it is only to apply where a statute has in terms confirmed or authorized a specific agreement. Sect. 15 of the Act of 1888 refers to and amends s. 8 of the Regulation of

---

under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration: Provided, that the power of compelling a reference to the Commissioners in this section contained shall not apply to any case in which any arbitrator has in any general or special Act been designated by his name or by the name of his office, or in which, a standing arbitrator having been appointed under any general or special Act, the Commissioners are of opinion that the difference in question may more conveniently be referred to him."

Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 15: "For the purposes of section 8 of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorized to be referred to arbitration, the provisions of any agreement confirmed or authorized by any such Act shall be deemed to be provisions of such Act."

1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Railways Act, 1873. The question arose in *Reg.* v. *Midland Ry. Co.* (1) whether, when an agreement for arbitration had been entered into between two railway companies which was afterwards confirmed by statute, s. 8 of the Regulation of Railways Act, 1873, applied. That case shews that the effect of an Act being subsequently passed confirming an agreement already made between the parties merely confirms it as an agreement. It was held that the obligation to refer differences to arbitration derived its efficacy as between the parties from the agreement, that it was contractual, and the fact that the agreement had been confirmed by statute did not bring the matters in difference within the provisions of s. 8 of the Regulation of Railways Act, 1873, as being required or authorized by an Act to be referred to arbitration. In *Great Western Ry. Co.* v. *Halesowen Ry. Co.* (2) A. L. Smith J. in his judgment points out the difficulty that might arise as to the construction of a statute confirming or authorizing an agreement. It might be contended on the one hand that the statute simply makes the agreement intra vires of the railway companies, and on the other that it does more, namely, that it enacts that the agreement shall be binding upon and shall be observed by the companies.

Sect. 15 of the Railway and Canal Traffic Act, 1888, was passed for the purpose of getting rid of any difficulty of construction of that kind. The meaning of that section is that where there is a specific agreement which the Legislature has confirmed or authorized, then that specific agreement is for the purpose of s. 8 of the Regulation of Railways Act, 1873, to be treated as if it were part of the statute, and as if the difference were one which the statute required or authorized to be referred to arbitration, so that s. 8 of the Act of 1873 is to apply. If s. 15 of the Railway and Canal Traffic Act, 1888, is not limited to the case where an agreement has been specifically confirmed or authorized by a general or special Act, it will follow that, as railway companies cannot enter into any agreement except by virtue of statutory authority, the provisions of every agreement between them containing an arbitration clause will be subject to the jurisdiction of this Court. That could not have been the

(1) (1887) 19 Q. B. D. 540. (2) (1883) 52 L. J. (Q.B.) 473.

intention of the Legislature. In one sense every agreement which a railway company, created as it is by statute, makes is authorized by statute. But s. 15 of the Act of 1888 does not refer to an agreement so authorized. It deals with the case where a statute has been passed authorizing or confirming a specific agreement either set out in the body of the statute or scheduled to it, or indicated clearly by reference to the specific agreement. If the Legislature had intended that the provisions of s. 15 of the Railway and Canal Traffic Act, 1888, should apply to any agreement made between railway companies, express words to that effect would have been used. The judgment of Lord Cairns L.C. in *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1) shews that where a statute is passed confirming an agreement the question may arise whether the only effect of the confirming Act is, upon its true construction, to confirm the agreement as a contract and make it intra vires of the company and binding it by virtue of that contractual relation, or whether there are words in the statute which ought to be considered as requiring the railway companies to fulfil and perform the contract. The object of s. 15 of the Railway and Canal Traffic Act, 1888, was to obviate all such discussion by enacting that wherever Parliament has confirmed or authorized an agreement containing a provision for reference to arbitration, that provision for arbitration shall be considered as equivalent to a provision in a statute requiring or authorizing arbitration within the meaning of s. 8 of the Regulation of Railways Act, 1873. Sect. 34 of the Barry Dock and Railways Act, 1891, does not deal with the question. In the present case there is no statute confirming or authorizing the agreement, nothing except the general authority conferred by s. 87 of the Railways Clauses Consolidation Act, 1845. That is not sufficient to make s. 15 of the Railway and Canal Traffic Act applicable, and the Court therefore has no jurisdiction to entertain the application.

Sir Alfred Cripps, K.C., *Simon, K.C.*, and *F. G. Thomas*, for the applicants. The question arises as to what agreements between railway companies are included in the ambit of s. 15 of the Railway and Canal Traffic Act, 1888. In *Reg.* v. *Midland*

(1) (1874) L. R. 2 H. L. (Sc.) 347.

1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Ry. Co.(1) it was decided that under the Regulation of Railways Act, 1873, the authority of this Court only arose where the provision as regards arbitration was a statutory one as distinguished from a contractual relationship. But the true construction of s. 15 of the Railway and Canal Traffic Act, 1888, cannot depend upon the decision in that case. The question is what is the meaning of the words "provisions of any agreement . . . . authorized by any such Act," i.e., by any general or special Act? These words do not mean an agreement only which is specifically authorized by a general or special Act.

The authority under which the agreement of June 29, 1893, was made was conferred partly by a general Act, the Railways Clauses Consolidation Act, 1845, and partly by s. 34 of the special Act, the Barry Dock and Railways Act, 1891. It is impossible without eliminating the words "any agreement . . . . authorized by any such Act," i.e., by any general or special Act, which are contained in s. 15 of the Act of 1888, to introduce the limitation contended for on behalf of the defendants. Under s. 8 of the Regulation of Railways Act, 1873, jurisdiction was given to this Court to decide a difference between railway companies in lieu of the difference being referred to arbitration in the case only where a general or special Act — not an agreement — required or authorized it to be referred to arbitration. A difference which under the provisions of an agreement was to be referred to arbitration was therefore upon a different footing from a difference which a statute required to be determined by arbitration. The effect of s. 15 of the Railway and Canal Traffic Act, 1888, is to abolish that distinction. No absurdity results from the fact that this Court may be called upon to decide a wide range of differences arising out of agreements between railway companies.

There are four limitations on the right to call upon this Court to exercise its jurisdiction. 1. All the parties to the agreement must be either railway or canal companies. It is not enough that one of the parties is a railway or canal company. 2. There can be no reference to this Court if there is a designated

(1) 19 Q. B. D. 540.

arbitrator. 3. Although there is no designated arbitrator, if there is a standing arbitrator, and this Court, when it is applied to to decide the difference, thinks that it is more convenient that it should be dealt with by the standing arbitrator, he must decide it. 4. In no circumstances can the matter come before this Court unless it consents.

In *Reg.* v. *Midland Ry. Co.* (1) it was sought to place a strained meaning upon the word "confirmed" in a private Act in order to make s. 8 of the Regulation of Railways Act, 1873, applicable. The decision in that case did not turn upon the meaning to be given to the word "authorized" in s. 8 of the Regulation of Railways Act, 1873. In the Railway and Canal Traffic Act, 1888, the Legislature was not content to deal with the particular difficulty which had arisen in 1887 in *Reg.* v. *Midland Ry. Co.* (1), but provision was also made not only for cases where a statute confirms an agreement already made, but where it authorizes an agreement to be made. The subject-matter of s. 15 of the Railway and Canal Traffic Act, 1888, is therefore wider than the difficulty which was dealt with in *Reg.* v. *Midland Ry. Co.* (1), and the Act of 1888 ought not to be construed by reference to the decision in that case.

Sir R. Finlay, K.C., in reply. *Reg.* v. *Midland Ry. Co.* (1) is material, for in order to construe a statute the state of the law before it was passed and the mischief which it was designed to remedy must be considered. The occasion of the legislation of 1888 was the decision in *Reg.* v. *Midland Ry. Co.* (1) The principles upon which the decision in that case was based apply to an agreement which has been authorized by the terms of a statute. There is no reason why a general Act should not authorize a specific agreement—e.g., the agreement might be contained in a schedule to the Act. The explanation of the presence of the words "general or special Act" in s. 15 of the Act of 1888 is that that section refers to and amends s. 8 of the Act of 1873 which contains them. Sect. 34 of the Barry Dock and Railways Act, 1891, does not authorize the agreement. The agreement not being confirmed or authorized by any general or special Act within the meaning of s. 15 of the Railway and Canal

(1) 19 Q. B. D. 540.

1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Traffic Act, 1888, this Court has no jurisdiction to entertain the application.

A. T. LAWRENCE J. The question raised on this application is an important one and arises under s. 8 of the Regulation of Railways Act, 1873, and s. 15 of the Railway and Canal Traffic Act, 1888. The question appears to be whether any agreement between railway companies containing an arbitration clause comes within the scope of those sections. Sect. 15 of the Railway and Canal Traffic Act, 1888, requires the agreement to be either confirmed or authorized by a general or special Act, and enacts that the provisions of the agreement so confirmed or authorized "shall be deemed to be provisions of such Act." Although that is an enactment of a somewhat unusual nature, it is to be observed that it is only for the purpose of s. 8 of the Act of 1873, and that the effect is that jurisdiction is given to this Court to deal with matters in difference between railway companies in those cases only where the Court consents, and in which no arbitrator has been nominated by an Act, or no standing arbitrator has been appointed. I am of opinion that the Court has the jurisdiction contended for by the applicants. I am not anxious to have the burden of determining disputes under the agreement of 1893 cast upon us, but I find the greatest difficulty in dealing with s. 15 of the Railway and Canal Traffic Act, 1888, otherwise than by accepting the argument on behalf of the applicants. The words are so wide—"the provisions of *any* agreement confirmed or authorized" by "*any*" "general or special Act" "shall be deemed to be provisions of such Act." I cannot see any ground for restricting these words to agreements specifically referred to in an Act. In the present case there is a further ground for deciding in favour of the applicants apart from the mere literal construction of s. 15 of the Act of 1888. It appears to me that s. 34 of the special Act —the Barry Dock and Railways Act, 1891—contemplated that this Court should from time to time determine the terms and conditions under which the powers conferred by that Act were to be exercised, and it would be strange if the parties could by their perpetual agreement of 1893 keep the matter out of the

jurisdiction of the Court and confer exclusive power to deal with it upon an arbitrator. I do not say that that is at all a convincing reason, and I should not have been disposed to overrule the objection to our jurisdiction on that ground; but in my opinion the language of s. 34 of the Barry Dock and Railways Act, 1891, shews that it was intended that the express words of s. 15 of the Railway and Canal Traffic Act, 1888, in their full literal meaning should apply, and we must hold that under that section, coupled with s. 8 of the Act of 1873, we have jurisdiction to entertain the application.

THE HON. A. E. GATHORNE-HARDY. I agree.

SIR JAMES T. WOODHOUSE. I am entirely of the same opinion, and for the same reasons.

Objection to jurisdiction overruled.

J. E. A.

The defendants appealed.

June 24. *J. E. Bankes, K.C.* (*Sir R. B. Finlay, K.C.*, and *Joseph Shaw* with him), for the defendants. In order correctly to construe s. 15 of the Railway and Canal Traffic Act, 1888, it is necessary to consider the scope of s. 8 of the Regulation of Railways Act, 1873, of which s. 15 is an amendment, and the decisions upon the earlier section. Sect. 8 of the Act of 1873 was by its terms confined to cases where differences between railway companies or canal companies, or between railway companies and canal companies, were by any general or special Act required or authorized to be referred to arbitration. Consequently, where there was an agreement between railway companies which provided for the reference of disputes to arbitration, it was held that, although that agreement was specifically confirmed or authorized by an Act of Parliament, yet, inasmuch as the provision for arbitration derived its efficacy from the agreement of the parties, and not from the Act of Parliament, the case did not come within s. 8 of the Act of 1873: see *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.*(1) and *Reg.* v. *Midland Ry.*

(1) (1881) 17 Ch. D. 493.

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Co. (1) Sect. 15 of the Act of 1888 was passed to extend the provisions of s. 8 of the Act of 1873 to the class of cases which were held by those decisions to be excluded from that section, namely, cases where agreements between railway companies containing arbitration clauses were specifically confirmed or authorized by statute. The construction contended for by the applicants in this case would render the section applicable to every agreement entered into by railway companies which contained an arbitration clause, inasmuch as every agreement entered into by railway companies is in a sense authorized by statute, because a railway company is a statutory body, which can only act in pursuance of its statutory powers. Such a construction is obviously too wide. An agreement does not come within s. 15 merely because it is entered into between railway companies in pursuance of their general powers as statutory corporations. Some limitation must be put on the words of s. 15. It is contended that it must be confined to cases where the agreement is confirmed or specifically authorized by statute, whether general or special. Moreover, in order to bring the case within s. 15, it is not enough that some of the provisions of an agreement made between railway companies should be confirmed or authorized by statute, if such provisions do not relate to arbitration. Having regard to the scope of s. 8 of the Act of 1873, and the decisions upon that section, it is clear that the provision for arbitration must be confirmed or authorized by statute.

It is true that agreements between railway companies for the exercise of running powers by one company over the line of another are authorized by a general Act, namely, by the Railways Clauses Consolidation Act, 1845, s. 87, but that section does not refer in any way to the settlement of disputes arising under such agreements by arbitration. It is clear that the provision for arbitration in the agreement in this case was not authorized by s. 34 of the Barry Dock and Railways Act, 1891, for that section made different provisions with regard to arbitration in the event of the companies not being able to come to an agreement. To bring an agreement within s. 15, there must be

(1) 19 Q. B. D. 540.

something equivalent to statutory confirmation or authorization of a provision for arbitration contained in it. Here the agreement so far as it related to arbitration was made in the exercise of the general powers of the railway companies as statutory bodies, and had nothing in the nature of a statutory authorization. [He also cited *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1).]

Sir Alfred Cripps, K.C., and *Simon, K.C.* (*F. G. Thomas* with them), for the applicants. It is difficult to see how an agreement can be specifically confirmed or authorized by a general Act. The agreement here was authorized, within the meaning of s. 15 of the Act of 1888, by the Railways Clauses Consolidation Act, 1845, s. 87, and the Railway Companies Arbitration Act, 1859, ss. 2, 26. There is nothing in the language of s. 15 to confine it to cases where the provision for arbitration, as distinguished from the general subject-matter of the agreement, may be considered to have been specifically confirmed or authorized by statute. Nor is there any reason in the nature of things why the scope of the section should be so restricted. The Railways Clauses Consolidation Act, 1845, s. 87, gives power to railway companies to enter into agreements for the exercise of running powers by one company over the lines of another. If, in pursuance of that power, or any similar power given by a special Act, railway companies enter into an agreement for the exercise of such running powers, and introduce into that agreement an arbitration clause for the settlement of any disputes arising under it, that agreement as a whole may properly be said to have been authorized by statute, and therefore is within the terms of s. 15. It is not really necessary for the applicants to contend that every agreement containing an arbitration clause entered into between railway companies comes within s. 15, as being authorized by statute, because railway companies are statutory bodies, but there is in truth no reason why they should shrink from going to that length, if it were necessary for the purposes of this case. It is for the advantage of railway companies that there should be power to resort to the Railway Commissioners for the settlement of disputes between them.

(1) L. R. 2 H. L. (Sc.) 347.

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

The application of s. 8 of the Act of 1873 is limited in various ways. It is confined to differences arising between railway or canal companies, or between railway and canal companies; it can only come into operation where one of the companies desires it; it does not apply where there is a designated arbitrator, or where, a standing arbitrator having been appointed under any general or special Act, the Railway Commissioners are of opinion that the difference may more conveniently be referred to him; and any difference can only be referred to the Commissioners under the section with their consent. Having regard to all these limitations, there would be nothing really extravagant in contending that the provisions of s. 8 of the Act of 1873 were intended to be applied by s. 15 of the Act of 1888 to all agreements between railway or canal companies or between railway and canal companies containing provisions for arbitration but it is not necessary to go that length for the purposes of this case. It is sufficient for the applicants to contend that, where an agreement between railway companies in respect of a particular subject-matter is specifically authorized by a statute, as is the case with regard to an agreement as to running powers, and the companies entering into such an agreement include therein an arbitration clause, the provisions of s. 15 apply. It is not necessary that the provision for arbitration should have been specifically authorized by a statute.

Bankes, K.C., for the defendants, in reply. The words "under the provisions of any general or special Act . . . . required or authorized to be referred to arbitration" in s. 8 of the Act of 1873 involve an express authorization of reference to arbitration by statute. It is contended that s. 15 of the Act of 1888 only contemplated cases coming within the general scope of the former enactment.

Cur. adv. vult.

July 16. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal against an order made by the Railway Commissioners which, after recitals as to the questions and differences which had arisen between the two companies, was in these words: "This Court doth declare that the said questions and

differences come within section 8 of the Regulation of Railways Act, 1873, and section 15 of the Railway and Canal Traffic Act, 1888, and that this Court has jurisdiction to determine the same."

The whole question here really is as to the jurisdiction of the Railway Commissioners. The question, therefore, is whether an agreement entered into between the Great Western Railway Company and the Barry Railway Company, which is not specifically confirmed or authorized by any Act of Parliament, falls within the operation of s. 15 of the Railway and Canal Traffic Act, 1888, amending s. 8 of the Regulation of Railways Act, 1873.

Now, under the Regulation of Railways Act, 1873, it was decided in *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (1) that a reference to arbitration which is authorized by an Act of Parliament is not a reference to arbitration by or under the provisions of any special Act of Parliament. The words of s. 8 of the Regulation of Railways Act, 1873,—the Act, that is, in reference to which the case of *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (1) was decided,—run thus: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration." The rest of this section, which refers to exceptions from its operation, need not be cited.

I will now try and see how this section would have run if it had contained the modification introduced by s. 15 of the Act of 1888, which section runs thus: "For the purposes of section 8 of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorized to be referred to arbitration, the provisions of any agreement confirmed or

(1) 17 Ch. D. 493.

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Vaughan Williams L.J.

authorized by any such Act shall be deemed to be provisions of such Act."

It seems to me that s. 8 of the Act of 1873 when modified by s. 15 of the Act of 1888 would run thus: "Where any difference between railway companies under the provisions of any general or special Act, or under the provisions of any agreement confirmed or authorized by an Act requiring or authorizing reference to arbitration, is required or authorized to be referred to arbitration, such difference shall, at the instance of any party to the difference, and with the consent of the Commissioners, be referred to the Commissioners for their decision in lieu of being referred to arbitration."

The Act as it originally stood, and as it now stands, deals with cases of differences between railway companies—not with all differences, but only with differences which under certain provisions are required or authorized to be referred to arbitration. Originally the "certain provisions" were provisions of any general or special Act passed before or after the passing of that Act. Under s. 15 of the Act of 1888 the "certain provisions" defined in s. 8 of the Act of 1873 are enlarged so as to include provisions not only of such special or general Act, but also provisions of any agreement confirmed or authorized by such Act; i.e., an Act under which a difference is required or authorized to be referred to arbitration. Now, the subject-matter affected by s. 8 of the Act of 1873 was differences between railway companies which under the provisions of a general or special Act were required or authorized to be referred to arbitration, and the Court of Appeal held that a reference to arbitration in an agreement which is authorized by Act of Parliament is not a reference to arbitration by or under the provisions of any general or special Act of Parliament: *Great Western Ry. Co.* v. *Waterford and Limerick Ry. Co.* (1) Let me illustrate this decision as I understand it by a concrete example. An agreement by one company to give another company "running powers" is ultra vires unless made under the powers of an Act of Parliament, and therefore is required or authorized by Act of Parliament. An agreement to refer disputes arising on the agreement by one company to give

(1) 17 Ch. D. 493.

another company running powers is not ultra vires, and is not made under the authority of any Act of Parliament, because, even if it is contained in an agreement requiring statutory authority, the agreement, so far as it is an agreement to refer, does not require statutory authority, and therefore is not authorized under the provisions of any Act of Parliament. Can this be said to be true of a difference which is referred under the provisions of an agreement? The answer is, Certainly not, unless the word "agreement" is limited to a certain species of agreement. Is the operation of s. 15 limited to a certain species of agreement? In words it is. It is limited to agreements "confirmed or authorized by any such Act." What does "any such Act" mean? It means, I think, a general or special Act requiring or authorizing differences between railway companies to be referred to arbitration. Let us see whether the present agreement is confirmed or authorized under a general or special Act requiring or authorizing differences between railway companies to be referred to arbitration. The applicants say that the present agreement is confirmed or authorized under the powers conferred by s. 87 of the Railways Clauses Consolidation Act, 1845, and ss. 2 and 26 of the Railway Companies Arbitration Act, 1859 which make intra vires contracts by one railway company giving running powers to another railway company and give effect to agreements, references, arbitrations, and awards made in accordance with the latter Act. The defendants on the contrary say that s. 15 of the Act of 1888 is limited to specific agreements authorized by Act of Parliament, and that s. 87 of the Act of 1845 only gives general powers making certain contracts lawful which, but for this section, would not have been intra vires, and neither requires nor authorizes reference of any difference arising on any specific agreement, and argue that, unless s. 15 is limited to specific agreements, every agreement which a railway company makes with another railway company would fall within the ambit of s. 15 of the Act of 1888, which is a result which the defendants' counsel submits that the Legislature could not have intended; and he further suggested that what the Legislature did intend was to clear up the difficulties referred to in the judgment of A. L. Smith L.J. in *Great Western Ry. Co.* v. *Halesowen Ry.*

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Vaughan Williams L.J.

Co. (1) as to the construction of Railway Acts, under which it was often difficult to decide whether the particular Act meant to give an agreement referred to therein statutory force, or merely to make it intra vires, by enacting that where an Act of Parliament confirmed or authorized a specific agreement, either set out in the body of the Act or scheduled to it, or indicated clearly by reference a specific agreement, then that should be treated for the purposes of s. 8 of the Act of 1873 as if Parliament had enacted that agreement. It seems to me that the reply of the counsel for the applicants is irresistible: you cannot have a specific agreement authorized by a general Act, and therefore one cannot read the word "specific" into this section.

I think, therefore, that this appeal must be dismissed.

FLETCHER MOULTON L.J. read the following judgment:—The point of law for our decision in the present case is one of general application in no way confined to the companies interested in this litigation or the special facts of this case. It bears on the provisions by which the Legislature has sought to transfer to the Railway Commissioners the jurisdiction and functions of arbitrators in disputes between railway companies. By these provisions the Railway Commissioners have become ex officio arbitrators in certain classes of disputes, and the question raised in the present case is as to the statutory delimitation of such classes.

The history of the legislation is as follows. By s. 8 of the Regulation of Railways Act, 1873, it is provided: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration." There follows a proviso making certain exceptions which need not be referred to as they are not material to the present case.

(1) 52 L. J. (Q.B.) 473.

As the legislation thus stood it was of narrow application. The number of cases in which the obligation or authorization to refer to arbitration is actually contained in the clauses of an Act of Parliament must be small. The ordinary procedure by which agreements between railway companies which need statutory validation obtain it is by the agreement itself being scheduled to an Act of Parliament, and being expressly confirmed by a clause therein. But the Courts in several cases have held that such confirmation of a scheduled agreement does not make the agreement itself part of the confirming Act, and therefore does not bring the case within the section which I have quoted above, even though the agreement contains an arbitration clause. Subsequently, however, the Railway and Canal Traffic Act, 1888, was passed. Sect. 15 of this Act reads as follows: "For the purposes of section 8 of the Regulation of Railways Act, 1873, and any other enactment relating to the reference to the Railway Commission of any difference between companies which under the provisions of any general or special Act is required or authorized to be referred to arbitration, the provisions of any agreement confirmed or authorized by any such Act shall be deemed to be provisions of such Act."

It cannot, I think, be doubted that the main object of this section was to correct the defect to which I have referred. But that defect would have been fully corrected if the word "confirmed" had stood alone instead of the phrase "confirmed or authorized" being used. The whole question which we have to decide turns on the interpretation we are to give to these words, and I confess that I have felt myself strongly drawn towards regarding them as being only an example of the tendency to unnecessary verbiage which sometimes affects not only those who draw up contracts, but those who frame statutes. But on further consideration I have come to the conclusion that I am not justified in so regarding them. The language is so much ampler in its scope than would be required were it merely intended to bring in the case where an existing agreement is validated by a confirming Act that I do not feel myself able to treat s. 15 as applying solely to such cases, and I have come to the conclusion that we must give to the words of the Legislature

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Fletcher Moulton L.J.

their full and ordinary meaning uninfluenced by any preconception as to their object.

There can be no doubt that, when the section speaks of an agreement confirmed by an Act of Parliament, it refers to an agreement formulated before the passing of the Act and expressly confirmed by that Act. In such a case the provisions of the agreement are to be deemed provisions of the Act for the purposes of s. 8 of the Regulation of Railways Act, 1873, that is to say, for the purpose of deciding whether disputes as to the matters contained in the agreement are or are not to be referred to the Railway Commissioners. Thus far there is no difficulty in construing or applying the language of s. 15. It is, no doubt, unusual to find a general Act confirming a special agreement between railway companies, but that constitutes no difficulty. If the case should occur, the section applies. If it should never occur, no difficulty arises.

But when we consider the word "authorized" a question of great difficulty arises. It is impossible to restrict the application of the term to agreements already in existence at the date of the Act. If by an Act of Parliament one railway company is authorized to make an agreement with another railway company for special purposes, and thereupon, under the powers so given to them, the railway companies formulate and make such an agreement, it is impossible, in my opinion, to treat that agreement otherwise than as an agreement authorized by the Act. It therefore follows that, although the actual agreement was not in existence at the date of the Act, and therefore could not be scheduled to it, or referred to in it as an existing document, its provisions must, according to s. 15, when formulated be deemed to be provisions of the Act, and, if it contains an arbitration clause, the case is brought within the scope of s. 8 of the Regulation of Railways Act, 1873.

To this reasoning I can see no answer, and if s. 15 related only to special Acts, I should feel no reluctance in accepting the conclusion. So far as concerns the desirability of making the Railway Commissioners ex officio arbitrators there is little difference between confirming an agreement for a special purpose which is actually made and authorizing

such an agreement to be made and thereby prospectively confirming it.

But the matter becomes very different when we apply the language to the case of a general Act. It is no doubt rare to find an agreement which is confirmed by a general Act, but the same is not true of agreements authorized by a general Act. On the contrary it is in general Acts that we find the authority to railway companies to make many of the more important types of agreement among themselves, because railway companies are creatures of statute, and their contractual powers (other than in matters incidental to their very existence and everyday working) must be looked for in the general statutes which regulate them. If then all agreements between railway companies which rest upon authorization given by general statutes are to come within the provisions of s. 15, the scope of s. 8 of the Regulation of Railways Act, 1873, is enormously widened. Whole classes of agreements made without any fresh or specific authorization fall within s. 15, because the contractual powers on which they rest were given by some general Railway Act. No better example could be given than the agreement in the present case. Counsel for the respondents point out rightly that working agreements between railway companies are only valid by reason of the authority given by s. 87 of the Railways Clauses Consolidation Act, 1845, inasmuch as any such agreement is in the nature of a delegation of statutory powers, and such a delegation is not ordinarily intra vires in the case of statutory companies. But that section authorizes the making of working agreements, and therefore the respondents contend that every valid working agreement is an agreement authorized by that general Act, and therefore comes within the scope of s. 15.

Such a wide extension is, I confess, startling, and were it possible to avoid it and yet give fair effect to the actual language of the statute, I should hesitate to adopt it. But I cannot in any other way give a fair interpretation to the words "any agreement . . . . authorized by any such (i.e. general) Act." The authorization being given by a general Act points irresistibly to its being the authorization of a class of agreements, and not of a specific agreement between specific companies; and, if the object

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Fletcher Moulton L.J.

of the provision was to bring whole classes of agreements within the operation of s. 8 of the Regulation of Railways Act, 1873, I cannot draw the line between those large classes of agreements which were first authorized by so fundamental a general Act as the Railways Clauses Consolidation Act, 1845, and those which were authorized by subsequent general Acts. I am driven therefore to the conclusion that all agreements resting for their authority on statutory powers expressly given to railway companies by general Acts come within the scope of s. 15. This, however, does not bring in agreements which are made between railway companies under the general powers which arise directly from their creation as corporations for a special purpose. Such agreements are not in any fair sense of the words agreements authorized by any general or special Act.

Although I admit that I have come reluctantly to the above conclusion, I must confess that, on considering its consequences, I think that there was no ground for that reluctance other than a preconceived notion of the proper intention of the Legislature for which there was no sufficient foundation. It will be found that s. 8 of the Regulation of Railways Act, 1873, does not seek to make the Railway Commissioners ex officio arbitrators in all disputes between railway companies. It affects only cases where the differences are statutably required or authorized to be referred to arbitration, which implies that they refer to matters of such character or importance that Parliament takes specific notice of them and directs that they shall be settled in that way. Without, therefore, formally classifying the differences according to their nature, it indirectly points to an intention that the cases in which the Railway Commissioners are to act as arbitrators are of a certain type. By extending the operation of s. 8 to the case of arbitration clauses in agreements which are confirmed by special Acts of Parliament it again points to including the class of agreements that relate to matters with which railway companies cannot deal by way of agreement otherwise than with parliamentary sanction. The limitation in both these cases excludes, and was obviously intended to exclude, agreements relating to matters within the ordinary powers of railway companies, but to include substantially all those cases where specific parliamentary assistance is given

in order to enable the company to make valid contracts or to fix the terms on which they shall be made. We find that the Legislature when including such cases includes also cases where the authorization is given by a general Act, that is to say, it makes s. 8 apply to cases where the parliamentary assistance is given by anticipation and by a general Act. It seems to me that the Legislature remains constant to the idea that it will not require the Railway Commissioners to be taken as ex officio arbitrators unless the matters in difference are such that a contract relating to them can only be validly made by parliamentary assistance, but that it has thrown aside any restrictions as to the mode of giving that assistance. It may be retrospective or prospective. It may be by general or special legislation. But these extensions do not seem to me to touch the fundamental idea of these statutory provisions as to compulsory reference to the Railway Commissioners, namely, that the matters to which the contracts relate should be presumably of a particular type, that is to say, matters which do not fall within the general powers of railway companies, but rest on powers given specifically to them by parliamentary action. Viewed in this light the extension, though very wide, is intelligible, and is not inconsistent with that which is in my opinion the true aim of the Legislature.

As to the next point which arises in this case I feel no difficulty. When an agreement comes within the scope of s. 8 of the Regulation of Railways Act, 1873, by reason of its coming within the scope of s. 15 of the Railway and Canal Traffic Act, 1888, the whole of that agreement must be taken to be a part of the provisions of the Act which authorizes it. We are not justified in picking and choosing among the clauses of the agreement and treating some of them as being provisions of the authorizing Act and others not. The reason is clear. In English law an agreement is looked upon as one and indivisible, and all the considerations moving from the one part are deemed as a whole to constitute the consideration for all the considerations moving from the other part, and nothing but the most specific language would, in my opinion, authorize one to treat the different parts of one agreement differently for such a purpose as the present. There is a complete absence of any such specific directions in the present case. It is

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Fletcher Moulton L.J.

clear that in the case of an agreement confirmed by an Act of Parliament the whole agreement must be deemed to be provisions of the Act, and I can see no reason why we should treat agreements authorized by Acts in any other way. But in the present instance this point seems to me to be merely of academic interest for the following reasons. An arbitration clause is a contractual obligation. It forms part of the terms of the bargain between the parties just as truly as a money consideration. It is true that it is a term of imperfect obligation in the sense that you cannot in all cases compel its specific performance, and where that is not the case it is difficult to establish a claim for other than nominal damages in respect of its breach. But none the less it is a part of the consideration. The consequence is that, if an agreement relating to several matters, entirely distinct the one from the other, has a general arbitration clause in it, that arbitration clause forms part of the consideration of the bargain thereby made with regard to each of the distinct matters. Therefore, if we were to take the view that it is only such portion of the written agreement as relates to matters as to which a railway company can only contract by virtue of direct statutory authority that must be treated as provisions of the authorizing Act, a general arbitration clause would form part of the actual agreement with regard to these matters. In the present case the differences that arise are differences which relate to matters as to which the authority to contract is derived from a general Act of Parliament. The contract includes a general arbitration clause. That clause, therefore, must be deemed to be part of the provisions of the general Act, and s. 8 of the Regulation of Railways Act, 1873, applies.

If I rightly understand the argument of counsel for the appellants, they contend that, inasmuch as no special statutory powers are required to submit a dispute to arbitration, therefore arbitration clauses should be considered as outside the operation of s. 15 because that part of the agreement is not authorized by either a general or a special Act. But this would make the section inoperative. It is operative solely because in certain cases it has the effect of making arbitration clauses part of the provisions of Acts of Parliament so as to bring the agreements in which

they occur within the scope of s. 8. The flaw in the argument is that they forget that a submission to arbitration in an agreement is a contractual clause and is part of the exercise by the company of the powers to contract given to it by the general or special Act. It no doubt would not require statutory power to refer to arbitration an existing dispute under a valid agreement. But where the obligation to refer is made part of an agreement it can only be done under powers entitling the company to contract about the matters to which the submission relates.

I have now to apply the above conclusions to the facts of the present case. By s. 30 of the Barry Dock and Railways Act, 1891, the Barry Railway Company acquired the right to run over and use for the purposes of traffic of every description a certain branch railway belonging to the Great Western Railway Company. This right was not, however, given unconditionally. Sect. 34 relates to the terms, and reads as follows: "The terms conditions and regulations on and subject to which the company shall be entitled to run over and use any part of the Great Western Railway under the powers of this Act and the stations and works connected therewith and the tolls or other consideration to be paid in respect of the same shall if not agreed upon between the company and the Great Western Railway Company be from time to time determined in manner provided by the Regulation of Railways Act 1873 as amended by the Railway and Canal Traffic Act 1888 with respect to differences between railway companies." Thus by the combined effect of ss. 30 and 34 the two railways are authorized to make a valid agreement for granting running powers over the branch line. This agreement has been made, and no objection is taken to it on the ground that it exceeds the powers given by the Act. It contains an arbitration clause. To my mind it is clear that this agreement is authorized by the special Act in question. It is true that there are no specific words authorizing the two companies to agree to the terms of user of the line, but on the simplest and most fundamental principles of construction such a statutory power must be held to be impliedly given by the language of the Act. Sect. 34 provides for the course to be taken if the companies do not agree to the terms, and, therefore, it implies that such an agreement

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Fletcher Moulton L.J.

is within their statutory powers. It is possible that it may be so by reason of s. 87 of the Railways Clauses Act, 1845, or it may be so by reason of this special Act. It is unnecessary to decide which of these alternatives we take (though personally I prefer the latter view), as the result is the same. I am therefore of opinion that the case comes within s. 15 of the Railway and Canal Traffic Act, 1888, and that, therefore, s. 8 of the Regulation of Railways Act, 1873, applies, and the Railway Commissioners have jurisdiction to take the arbitration, and that this appeal should be dismissed.

BUCKLEY L.J. read the following judgment:—To apply s. 15 of the Railway and Canal Traffic Act, 1888, I have first to inquire whether the agreement of June 29, 1893, or certain provisions of that agreement constitute "provisions of an agreement confirmed or authorized by any general or special Act." The only two Acts suggested are the Barry Act, 1891, s. 34, and the Railways Clauses Act, 1845, s. 87. The former, namely, s. 34 of the Act of 1891, provides that, if the terms of the running powers are not agreed, reference to arbitration shall be made to the authority constituted under the Act of 1873, as amended by the Act of 1888. The facts are that the terms of the running powers were agreed, and that the parties by article 19 of the agreement agreed to refer to another authority, namely, that constituted under the Act of 1859. The agreement of June 29, 1893, therefore, is certainly not one authorized by s. 34 of the Barry Act, 1891, being, as it was, not a section which authorized any agreement, but a section which contained provisions as to what was to happen in default of agreement, namely, that reference should in that case be made to a tribunal different from that which the parties by the agreement selected. Then, secondly, was the agreement of June 29, 1893, authorized by s. 87 of the Act of 1845? So far as it was an agreement for running powers, it was authorized by that section. But, so far as it was an agreement to refer differences to arbitration, it was not authorized by that or any other section. The right of a railway company to refer to arbitration is not conferred by statute, but exists independently of statute, although controlled in certain

details by statute. No statutory authority is wanted to enable a railway company to agree to a reference. The company is not authorized by statute to go to arbitration. It is by virtue of the statute a statutory body, and, as incident to the purposes for which the statute creates it, it has power to litigate, if it resorts to litigation, or to arbitrate, if it resorts to arbitration.

These being the circumstances, the question is as to the application of s. 8 of the Act of 1873, as amended by s. 15 of the Act of 1888. The effect of s. 8 of the Act of 1873 is that, where by general or special Act statutory provisions for arbitration are binding upon a company, the provisions of that section shall have effect. The effect of s. 15 of the Act of 1888 is that, where contractual obligations for arbitration are binding upon a company, and those contractual obligations are confirmed or authorized by any general or special Act, the provisions of s. 8 of the Act of 1873 shall in like manner have effect. The respondents' contention in its broadest terms is that every agreement made by a railway company is an agreement confirmed or authorized by some special or general Act, and that every such agreement, therefore, containing an arbitration clause is within s. 15 of the Act of 1888 and therefore within s. 8 of the Act of 1873. A contention so extreme requires no answer other than saying that in effect it substitutes in s. 15 for the words "confirmed or authorized by any such Act" the words "made by the company." This is contrary to well established principles of construction. Every contract made by a statutory body must, no doubt, in a broad sense be confirmed or authorized by statute, namely, in the sense that it is ultra vires unless it be competent to the corporation having regard to the statutes which control the corporation. But the language of s. 15 shews that not all, but only some, contracts of the statutory body are there referred to, namely, provisions of an agreement confirmed or authorized by general or special Act.

The second and more arguable contention is that, if the agreement is one some part of which rests upon express statutory authority found in some general or special Act, then subsidiary provisions of that agreement which do not require statutory authority (namely, provisions for arbitration) are to be taken to be

C. A. 1909

GREAT WESTERN RAILWAY v. BARRY RAILWAY.

Buckley L.J.

provisions for the purpose of s. 15. In my opinion this is not the true construction. Sect. 8 of the Act of 1873 deals with statutory arbitration clauses. Sect. 15 of the Act of 1888 deals, I think, with contractual provisions for arbitration contained in an agreement, which provisions are by general or special Act confirmed in the case of an agreement made in the past, or specifically authorized as regards an agreement to be made in the future. If there be an agreement which, as a whole, is confirmed or authorized by Act, and that agreement contains arbitration clauses, s. 15 of the Act of 1888, no doubt, applies. But an agreement relating to running powers made under the statutory authority in s. 87 of the Act of 1845, into which the parties may or may not introduce a contractual clause for arbitration, does not, in my opinion, fall within s. 15, because some part of it, namely, that not relating to arbitration, is made under the general statutory authority to grant running powers. The frame of s. 15 is that, for the purposes of a section which related to provisions for arbitration imposed by statute, contractual provisions as to arbitration confirmed or authorized by Act shall be deemed provisions of the Act. The question then is, not whether the agreement, but whether the provisions as to arbitration in the agreement are confirmed or authorized by Act. Where the whole agreement is scheduled to an Act the provisions as to arbitration are so confirmed. But that is not the present case, and the provisions as to arbitration are not here so authorized. For these reasons I think the decision under appeal is erroneous, that the Railway Commission had no jurisdiction, and that this appeal should be allowed.

Appeal dismissed.

Solicitor for applicants: *R. R. Nelson.*

Solicitors for defendants: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

E. L.

[COURT OF CRIMINAL APPEAL.]

1909

June 24.

THE KING *v.* PERRY.

Criminal Law—Evidence—Admissibility of Dying Declaration.

In order that a dying declaration as to the cause of death may be admissible in evidence at the trial of a prisoner for the murder of the declarant it must be shewn that at the time the statement was made the death of the declarant was imminent and that he had abandoned all hope of living, i.e., believed that death must follow. But it is not necessary to prove that the declarant believed that death would ensue immediately.

Ruling of Lush L.J. in *Reg.* v. *Osman*, (1881) 15 Cox, C. C. 1, not followed.

APPEAL by the prisoner Elizabeth Perry against her conviction for the murder of Agnes Margaret Summersby.

The trial took place on June 16, 1909, before Lawrance J. and a jury at the Warwick Summer Assizes, when it appeared that the murdered girl, who was twenty-four years of age and lived with her parents, was on April 9, 1909, four months gone in pregnancy. On that morning she went out, being then in a good state of health, and returned late. On the following morning she vomited, and her mother, at her request, sent for the prisoner. The prisoner did not, however, come on that day, and on the next day (April 11) the deceased girl again went out. On April 13 the deceased sent her mother for the prisoner, and the prisoner accordingly visited the deceased at her home either on that day or on April 14. On April 14 the deceased had a miscarriage.

On April 16, early in the morning, the prisoner suggested that a doctor should be sent for. A Dr. Smith, who was advanced in years and not in general practice, came about 1 A.M., as he understood that the case was urgent. He asked the deceased girl whether she could account for the miscarriage and whether she had taken or done anything. The deceased made no reply, but the prisoner said, "She has been frightened by a horse." In the presence of the deceased, Dr.

1909

REX v. PERRY

Smith said, in reply to a question by the prisoner as to whether there was any danger, that there was very great danger, and that the deceased might die at any moment. In cross-examination by counsel for the prisoner Dr. Smith said that he spoke in a subdued voice, as he did not wish to add to the deceased's mental anguish, but that the deceased could have heard him. She made no reply. She was, in his opinion, suffering great pain.

It further appeared that between 9 and 10 on the same morning the deceased's sister, Gertrude Summersby, lay down on the bed beside her, and said, "Oh, Maggie, what did you have that woman for? I don't like her." The deceased replied, "Oh, Gert, I shall go, but keep this a secret. Let the worst come to the worst. That woman opened my womb with something like a crochet hook on Good Friday" (April 9). "She told me to take a half-quartern of gin and a halfpenny packet of salts, and sit on a chamber of hot water, and I got up in the middle of the night and did it. She told me that when I was bad I was to send for her and not for a doctor. I laid myself on a sofa with my back towards her and one knee raised." The deceased's sister was the only person present when this statement was made. Subsequently, at Dr. Smith's request, another medical man, Dr. Haynes, was sent for, and arrived soon after 11 A.M. He asked the deceased, in the presence of the prisoner, what had caused the miscarriage. This was about an hour and a half after the statement above set out had been made by the deceased to her sister. The prisoner replied that the deceased had been frightened by a horse some days before, and the deceased then said that she was going along a road and that the horse came out of an entry, kicking and roaring, and nearly made her fall backwards a few days previously. She died on April 16 at 5 or 5.30 P.M.

At the trial evidence of the statement made by the deceased to her sister Gertrude Summersby was tendered by the prosecution as a dying declaration made by the deceased as to the cause of her death.

On behalf of the prisoner it was objected that the statement was not admissible, as it referred to a future time, and there was nothing in it to indicate that the deceased when she made it

believed that she was on the verge of death. The words, it was contended, shewed that the deceased had not a hopeless immediate expectation of death, which was necessary in order to make the statement admissible.

Lawrance J., who was satisfied that the deceased had abandoned all hope of recovery at the time she made the statement, admitted the statement as a dying declaration made by the deceased as to the cause of her death, but expressed the opinion that, although it would be wrong for a criminal Court to be influenced by the fact of the existence of the Court of Criminal Appeal, the point was one of difficulty (having regard to conflicting expressions to be found in the authorities) and one which might well be considered by that Court. He added, "If it were not for that, I should refuse. I wish to make my position clear to both of you. I shall admit it for reasons which we all appreciate. I should not do it in any other sort of case. It leaves the whole question open to Mr. Maddocks" (counsel for the prisoner).

Upon the application of counsel for the prisoner, Lawrance J. granted a certificate that the case was fit for an appeal under s. 3 (*b*) of the Criminal Appeal Act, 1907, upon the question whether the statement was admissible in evidence.

The prisoner accordingly appealed.

Maddocks, for the prisoner. The statement made by the deceased to her sister was not admissible. The statement was made between 9 and 10 A.M. on April 16, and soon after 11 A.M. on the same day the deceased made the inconsistent statement to Dr. Haynes that the cause of the miscarriage was the fright occasioned by a horse. If the two inconsistent statements had been made in the same sentence, it is clear that neither would have had the weight which a statement which is admitted as a dying declaration ought to have, and the fact that one of the inconsistent statements was made about an hour and a half later than the other can make no difference.

In order that a dying declaration may be admissible there must be a settled hopeless expectation of death, although it is not necessary that there should be a belief in instant death:

1909

REX v. PERRY.

Reg. v. *Jenkins* (1); *Rex* v. *Woodcock* (2); *Reg.* v. *Gloster.* (3) The words "I shall go" refer to the future. Even if they be taken to mean "I shall die," they may not have meant that the deceased thought she would shortly die. The deceased may only have meant that she was very ill. In *Rex* v. *Abbott* (4) Kennedy J. refused to admit the statement "I am dying" on the ground that those words might be a mere expression of pain. *Reg.* v. *Forester* (5) illustrates the caution which the Courts have exercised upon the question whether a dying declaration ought to be admitted in evidence. The evidence is not sufficient to shew that the deceased knew she was dying at the time she made the statement to her sister. She may not have heard what Dr. Smith said. If the circumstances in which the statement was made throw no light on its meaning, the words themselves must be interpreted. The words "I shall go" are qualified by the succeeding words, "Let the worst come to the worst." The whole expression means "Whether I die or not, keep it a secret." That is not a sufficiently definite expression of her belief that she would shortly die. That interpretation which is most favourable to the prisoner ought to be placed upon the words. In order that the statement may be admissible it must be absolutely clear that it was made with the hopeless expectation of death. That does not sufficiently appear in the present case.

From the language used by Lawrance J. at the trial it is obvious that had it not been for the existence of the Court of Criminal Appeal he would not have admitted the statement.

Ryland Adkins and *B. S. S. Foster*, for the prosecution. In order that the statement may be admissible it is not necessary that the deceased should have believed that she would die immediately. It is sufficient if there is a settled hopeless expectation of death: *Reg.* v. *Peel* (6); *Reg.* v. *Witmarsh* (7); *Reg.* v. *Gloster.* (3) The evidence shews that the deceased girl knew that death was impending. She knew that she had

(1) (1869) L. R. 1 C. C. R. 187.
(2) (1789) 1 Leach, C. C. 500.
(3) (1888) 16 Cox, C. C. 471.
(4) (1903) 67 J. P. 151.
(5) (1866) 10 Cox, C. C. 368.
(6) (1860) 2 F. & F. 21.
(7) (1898) 62 J. P. 680.

undergone the operation and that she was in a dying condition. In those circumstances the reasonable and fair interpretation of the statement is that she wished that what had been done to her should be kept a secret when she had gone. The words "I shall go" mean "I shall die very soon indeed," and having uttered them, the deceased girl told her sister all that had happened to her.

Maddocks, in reply, referred to Archbold on Criminal Pleading, 23rd ed., p. 322.

The judgment of the COURT (Lord Alverstone C.J., Darling and A. T. Lawrence JJ.) was delivered by

LORD ALVERSTONE C.J. This appeal raises a very important question. The trial was one for murder arising out of the death of the girl Agnes Margaret Summersby through an illegal operation performed upon her. The evidence was not in all probability sufficient to secure the conviction of the prisoner apart from a dying declaration made by the deceased girl. At the trial Lawrance J. admitted the declaration, but expressed the opinion that the case was one fit for appeal in order that a definite ruling might be given by this Court, if possible, as to the admissibility of the statement made by the deceased girl to her sister. Before dealing with the actual terms of the statement we desire to point out that the principle has been recognized for many years and can be expressed clearly and definitely. In our opinion that principle cannot be expressed in better terms than those used by Eyre C.B. in *Rex* v. *Woodcock*. (1) He said: "Now the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of justice."

The expression "at the point of death" which is there used has given rise to some misapprehension, and in *Reg.* v.

(1) 1 Leach, C. C. 500.

1909

REX v. PERRY.

Osman (1) Lush L.J. said that there must be a settled hopeless expectation of "immediate death." We are of opinion that the presence or absence of expectation on the part of the declarant of immediate death is not the true test as to whether a statement as to the cause of death is admissible or not. Death must be imminent, but the material point is that the statement must be made when every hope of life has gone from the person making the statement. We think that that principle has been recognized in the later cases, to one or two of which we desire to call attention. In *Reg.* v. *Peel* (2) Willes J. said: "It must be proved that the man was dying, and there must be a settled hopeless expectation of death in the declarant." That sentence expresses in very clear and crisp language the rule which I have been trying to explain. In *Reg.* v. *Gloster* (3) Charles J., after examining the cases and citing *Rex* v. *Woodcock* (4), *Reg.* v. *Peel* (2), and *Reg.* v. *Osman* (1) (where Lush L.J. used the expression "immediate death"), and after expressing his view that the word "immediate" might be misunderstood, said: "The whole of the facts must be looked at from first to last; and I may say before I refer to the evidence in detail that it goes no further than this: that the woman thought that she was dying, thought that she would not recover, but in my judgment—and it is a most difficult thing to form a judgment of what was passing through the mind of this unfortunate woman—she did not entirely give up hope. And unless I can come to the conclusion that every hope was extinguished and gone I cannot admit the statement." It is also desirable to read a passage in the earlier part of the judgment in which Charles J. referred to the reasons why he differed from Lush L.J. He said: "In the latest case of all (*Reg.* v. *Osman* (1)) Lush L.J. lays down the principle in these terms: 'A dying declaration is admitted in evidence because it is presumed that no person who is immediately going into the presence of his Maker, will do so with a lie on his lips. But the person making the declaration must entertain a settled hopeless expectation of immediate death. If he thinks he will die

(1) 15 Cox, C. C. 1.
(2) 2 F. & F. 21.
(3) 16 Cox, C. C. 471.
(4) 1 Leach, C. C. 500.

to-morrow it will not do.' That is the judgment of Willes J. with this addition, that Lush L.J. inserts the word 'immediate' before death, and goes on to say: 'If he thinks he will die to-morrow it will not do.' With the greatest deference to the latter very learned judge I would rather prefer to adopt the language of Willes J. and say that the declarant must be under a 'settled hopeless expectation of death.' 'Immediate death' must be construed in the sense of death impending, not on the instant, but within a very very short distance indeed. These are the principles that have been laid down and are to guide me in the exercise of my judgment." In other words the test is whether all hope of life has been abandoned so that the person making the statement thinks that death must follow. In our opinion that is the true principle.

I now propose to apply that principle to the present case. It is for the judge at a trial for murder to admit as evidence a statement made by a deceased person for whose murder the prisoner is being tried if he thinks the statement was a declaration made in circumstances which render it admissible. In the present case it was contended on behalf of the prisoner that the language used by Lawrance J. at the trial at the time he admitted evidence of the declaration shewed that he would have come to the conclusion, had it not been for the existence of the Court of Criminal Appeal, that the statement was not made by the deceased girl with all hope of life gone, and that he would therefore not have admitted the evidence.

We have communicated with Lawrance J., and he informs us that what he intended to express at the trial was that he thought it was a case in which this Court should have the opportunity of laying down the principle upon which the admissibility of evidence of such statements ought to be determined. He informs us that he has no doubt that the deceased girl had abandoned all hope of life at the time she made the statement. We are of opinion that the right view is that in determining whether a declaration is admissible in evidence the judge at the trial ought to consider whether the death of the deceased was imminent at the time the declaration was made and to determine from the language used by the deceased whether the statement

1909

REX v. PERRY.

was made at a time when the deceased had "a settled hopeless expectation of death." In the present case, if the expression "I shall go" is taken alone, it might mean I shall die some day; but, taking into consideration the whole sentence, we concur with the opinion of Lawrance J. that the statement was made by the deceased with the hopeless expectation of death. By the expression "hopeless expectation of death" I mean that the deceased had abandoned all hope of living. The statement is therefore admissible as a dying declaration made by her. On these grounds we are of opinion that the appeal must be dismissed.

Appeal dismissed.

Solicitor for prosecution: *Director of Public Prosecutions.*
Solicitor for prisoner: *Registrar of Court of Criminal Appeal.*

J. E. A.

C. A.

1909

June 8; *July* 1.

[IN THE COURT OF APPEAL.]

McDERMOTT *v.* OWNERS OF S.S. TINTORETTO.

Employer and Workman—Compensation—Mode of Assessment—Seaman—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*); *First Schedule, par.* 3.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, the Act is applied to seamen, subject to certain modifications, including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is liable under the Merchant Shipping Acts to defray the expenses of maintenance of the injured seaman.

By paragraph 3 of the First Schedule, in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity:—

Held (Kennedy L.J. dissenting) that, in the case of a seaman, as in the case of any other workman, (1.) the "period of incapacity" dates from the accident and means the period during which the man is disabled from earning his full wages at his work, and is not limited to the period during which the employer is liable to pay compensation; (2.) the payments to which regard is to be had are not restricted to voluntary payments, but include payments under a contract whether

for wages or otherwise; consequently, that in assessing the compensation payable under the Act to an injured seaman the arbitrator is bound to have regard to wages paid to the man in accordance with s. 158 of the Merchant Shipping Act, 1894, between the date of the accident and the date of his discharge; but that "regard" is not equivalent to deduction, and that the mode and extent of the regard are left to the discretion of the arbitrator.

Per Farwell, L.J.: Upon the true construction of s. 7, sub-s. 1 (*e*), and paragraph 3 of the First Schedule the arbitrator, in fixing the amount of compensation in the case of a seaman, ought not to have regard to the expenses of maintenance and medical attendance payable by the ship-owner under the Merchant Shipping Acts.

Appeal from an award of the county court judge of Liverpool sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was engaged at Liverpool on October 10, 1908, to serve as an able seaman on the steamship *Tintoretto* for a voyage not to exceed three years, and to terminate at a port in the United Kingdom or Continent within home trade limits.

On December 21, 1908, whilst he was unshipping a ventilator during heavy weather, he was thrown against a windlass and broke his leg, and he was totally incapacitated from work for the remainder of his time on board.

On December 29, 1908, he was discharged and paid off at New York. He was taken to a hospital and remained there until his return to England, where he arrived on March 11, 1909.

The owners paid the man's wages in full between the date of the accident and the date of his discharge (which wages, including the cost of food and accommodation, amounted to 1*l.* 11*s.* 4*d.*), and defrayed the cost of providing the necessary surgical and medical advice at the hospital and of bringing him back to England in accordance with their obligations under the Merchant Shipping Acts.

The applicant claimed 15*s.* 6*d.* per week compensation from March 11, the date of his arrival.

The respondents admitted liability, and submitted to an award for payment of compensation from March 19, but this offer was not accepted.

The question between the parties was whether under s. 7

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

(which makes the Act applicable to seamen) and paragraph 3 of the First Schedule (1) the arbitrator ought to take into account the wages paid between the date of the accident and the date of the discharge, and whether credit ought to be given to the respondents for this payment, or for one half of it, by postponing the first weekly payment for a week or in some other manner.

The county court judge decided against the contention of the respondents. He did not think that paragraph 3 of the First Schedule applied to the obligatory payment of wages or the benefits or allowances which the seaman received by virtue of the Merchant Shipping Acts. In his opinion the fact of the postponement of the right of the seaman until after those independent and prior obligations had been discharged shewed that the Legislature had already taken those payments, benefits, or allowances into account. He therefore awarded that the compensation should commence from March 11.

The owners appealed.

Horridge, K.C., and *Segar*, for the shipowners. Paragraph 3 of the First Schedule to the Act of 1906, which shews on what basis the weekly payment is to be assessed and what payments are to be taken into account in arriving at that amount, differs from the corresponding provision in the Act of 1897 in that it does not exclude payments as wages and does not require the payment to be made in respect of the injury; and the paragraph says that it must be a payment made during the period of incapacity. By s. 7, sub-s. 1, the Act is made applicable to seamen subject to certain modifications, including (*c*), which provides that the weekly payment shall not be payable in respect of the period during

(1) The Workmen's Compensation Act, 1906, s. 7, sub-s. 1, provides that the Act shall apply to seamen subject to the following modifications:—"(*c*) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured . . . . seaman . . . ."

The First Schedule, par. 3, provides: "In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity . . . ."

which the owner of the ship is under the Merchant Shipping Acts liable to defray the expenses of maintaining the injured seaman. It is submitted that the county court judge ought to have taken into account, in fixing the weekly payment, the payment made for wages between the date of the accident and the date of the seaman's discharge. The judge has treated the wages as though they were a liability imposed upon the owners by statute; but that is a fallacy. This is a payment within paragraph 3, and it is made during the period of incapacity. Wages stand on a different footing from maintenance and medical expenses, because they are "payments." The learned judge has treated the wages as expenses and has confused payments with expenses. The right to compensation does not begin from the time when the wages cease, but from the time when the shipowner's liability to maintain ceases. The judge has also treated the period of incapacity as though the Legislature had said the period of liability to pay compensation, but the two things are not equivalent, as is shewn by *Chandler* v. *Smith*. (1) The owners have only asked that one half the wages shall be deducted, which is not strictly logical, and they ask that that shall be taken into account by postponing the weekly payments for a week, but they do not insist upon that precise form of relief. It is only necessary that the judge shall have regard to that payment. He may do that by postponing the period of compensation, which is a convenient mode of taking that payment into account, or in any other manner; and if it were shewn that the seaman had spent all his money the judge would not necessarily make any substantial deduction. The mode in which regard shall be had to the payment is left by the Legislature to the discretion of the judge, but he must not exclude it from consideration altogether. [They also referred to *Elliott* v. *Liggens*. (2)]

Atkin, K.C., and *Stewart Brown*, for the seaman. In fixing the amount of the weekly payments under the First Schedule, paragraph 3, the period of incapacity means the period of incapacity during which the employer is liable to pay compensation. The Legislature, in applying the benefits of the Act to seamen, intended that the seaman's right to compensation should not

(1) [1899] 2 Q. B. 506. (2) [1902] 2 K. B. 84.

C. A 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

commence until his right to maintenance under the Merchant Shipping Acts should cease, but it did not intend to deprive him of the right to compensation for any further period. It happens that in this case the interval between the accident and the seaman's discharge during which his wages were paid was only eight days; but cases might arise in which wages would be paid for a long time after the accident, and to deduct these wages from the amount of his compensation would be a very serious hardship. In the case of an ordinary workman he would be entitled to compensation from the date of the accident, but in the case of a seaman his right is postponed by reason of the liability imposed upon the shipowner by the Merchant Shipping Acts. Inasmuch as he is not entitled to compensation during that period, as he would have been if he had been an ordinary workman, so he is not to be mulcted in respect of any benefit he receives during that period. The moment that liability ceases the intention of the Legislature was to put the seaman on exactly the same footing as any other workman. Paragraph 3 of the First Schedule was not framed to meet the case of a seaman. In every other case you take into account a payment for wages because that goes in reduction of the employer's liability, but that is not so in the case of a seaman. You take into account payments which the injured man has received in relief of the weekly payments, but you do not take into account payments made in another regard and on a different footing altogether. There is no reason for deducting payments before liability. The reason why s. 7 (*e*) was inserted was that the advantages given to the seaman under the Merchant Shipping Acts were considered as an equivalent to compensation under the Workmen's Compensation Act. The Act fixes two periods which it was not intended should overlap, one the period of maintenance under the provisions of the Merchant Shipping Acts, during which period the man is to look only to those Acts, the other a period starting from the termination of the period of maintenance, from which time the liability of the owner to pay compensation commences. The seaman pays for the advantages he gets under the Merchant Shipping Acts by forgoing his right to compensation during the period of maintenance.

The report of the Departmental Committee with reference to the admission of seamen to the benefits of the Workmen's Compensation Act shews the evils which it was desired to correct. That report is admissible on the authority of *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks.* (1)

[COZENS-HARDY M.R. We do not think it legitimate to look at that report for this purpose.]

The argument on behalf of the owners must extend to the expenses of maintenance, since paragraph 3 of the First Schedule speaks of "any payment, allowance, or benefit," and these expenses are as much within the paragraph as the wages; but, upon the reasonable construction of that paragraph, it was only intended to apply to a voluntary payment, allowance, or benefit in relief of the employer's liability, and not to any payment, allowance, or benefit to which the workman was entitled independently either by statute or by contract with his master.

Horridge, K.C., in reply. It is said that a special meaning ought to be put upon "incapacity" in the case of a seaman, and that "the period of incapacity" means the period during which the owner is liable to pay compensation; but that is to put two different meanings upon the same word in the same Act, because in paragraph 1 (*b*), proviso (*a*), of the First Schedule the Legislature speaks of incapacity for a period during which no compensation is payable.

Cur. adv. vult.

July 1. COZENS-HARDY M.R. This appeal, though involving only a small sum, raises a question of importance and difficulty as to the application of the Act of 1906 to seamen. The general scheme of the Act is that a workman is entitled to compensation (*a*) from the date of the injury, and (*b*) during incapacity (First Schedule, paragraph 1). Paragraph 3 of the same schedule is as follows: "In fixing the amount of the weekly payment *regard shall be had* to any payment, allowance, or benefit which the workman may receive from the employer *during the period of his incapacity.*" I do not find any ambiguity

(1) [1898] A. C. 571.

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Cozens-Hardy M.R.

in this clause, as applied to an ordinary workman. "The period of incapacity" obviously dates from the accident, and it may be longer than the period during which compensation is payable, at least in one case, namely, where the incapacity lasts less than two weeks (see paragraph 1 (*b*), proviso (*a*)). Thus regard must be had to payments during the first week in fixing the amount of payment for the second week. Paragraph 3 is not limited to voluntary payments. It includes payments under a contract, whether for wages or otherwise. The paragraph does not direct these payments to be set off or deducted. To do this in every case would be obviously unreasonable. For example, if incapacity has lasted for four months when the matter comes before the county court judge, and during the first three months the employer has paid full wages, or a sum equivalent to full wages, it would not be right to reduce the payment for the next two months to a nominal sum on the ground that, taking the period of incapacity as a whole, the workman will have had half his wages. "Regard shall be had" means only that in considering whether the maximum weekly sum—namely, half wages—shall be allowed, or something less, the fact of prior payments, or allowances, must not be overlooked. It is for the county court judge, in the exercise of his discretion, to say how this is to be worked out. In some cases it may be proper to treat past payments as extinguishing, wholly or in part, the compensation for the past. In other cases it may be proper to reduce the weekly payment below the maximum. This Court ought not to be astute to find fault with the mode in which the discretion is exercised, provided only that it is not based upon a wrong principle. To refer to an example suggested in the argument; if an employer after an admitted accident gives 10*l.* to the injured workman, it is plain that the duty is imposed upon the county court judge by paragraph 3 to have regard to this payment in assessing the amount of the weekly payment. The discharge of this duty may be difficult, but it is not impossible.

Thus far I have dealt with the case of an ordinary workman. But s. 7 of the Act makes the Act apply to seamen, not in its entirety, but subject to certain modifications. Sub-s. 1 (*a*) clearly shews that the period of incapacity is reckoned from

the date of the accident on board the ship. Sub-s. 1 (*e*) provides that the weekly payment is not to be payable in respect of the period during which the owner of the ship is by s. 34 of the Merchant Shipping Act, 1906, liable to defray the expenses of maintenance of the injured seaman. Now, this liability continues until the seaman is brought back to a home port. With this modification, which alone is material for the purpose of this appeal, the Act, including paragraph 3 of the First Schedule, must be applied to seamen. I can see no justification for reading the words "during the period of his incapacity" as meaning during the period in which the employer is liable to pay compensation. I must take those words in their plain meaning, in the meaning in which they are used in paragraph 1 of the schedule, and I see no escape from the conclusion that payments made after the accident, but before the seaman is brought home, are things to which the county court judge must have regard.

Now the material facts are these: The applicant was engaged on October 10, 1908, to serve as an able seaman on the *Tintoretto* for a voyage not to exceed three years. On December 21, during rough weather, the applicant fractured his left leg and was totally incapacitated. He was discharged and paid off at New York on December 29, and taken to a hospital, where he remained until he was returned as a passenger at the owners' expense to this country on March 11. The county court judge has awarded him compensation from March 11, but has held that he ought not to have regard to the wages paid for the eight days from December 21 to December 29. For the reasons above stated, I think the learned judge did not take a correct view of his power and his duty. In the present case the amount is so small that probably only a nominal effect will be produced by having regard to it. But the case has been argued on principle, and our decision will govern other cases in which large amounts may be involved. I think the appeal must be allowed and the case remitted to the county court judge, with a direction that he is to have regard to the wages paid to the applicant between December 21 and December 29. The respondents must pay the costs of the appeal.

In the argument before us no claim was made in respect of the expenses of maintenance, &c., as distinct from wages. I

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

desire to keep an open mind upon this point should the case ever arise for decision.

FARWELL L.J. I agree with the Master of the Rolls.

The Act provides for compensation in respect of injury disabling a workman for a period of at least one week from earning full wages at the work at which he was employed (s. 1, sub-ss. 1 and 2 (*a*)). Any question as to the amount of such compensation is to be settled by arbitration under the Act (s. 1, sub-s. 3), and Sched. I. sets forth provisions for the guidance of the arbitrator in determining the questions left to him. Paragraph 1 (*b*) provides that when total or partial incapacity results, a weekly payment during the incapacity, not exceeding 50 per cent. of his average weekly earnings during the preceding twelve months, shall be paid (with certain provisoes not applicable to the present case). Paragraph 3 provides that in fixing the amount of weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the period of his incapacity. I think it is clear that "payment," which is contrasted with "allowance" or "benefit," includes payments under contract as well as voluntary payments. The scope and intention of the Act is to give compensation to the workman for his inability to earn full wages; if the contract of his service provided that he should receive full wages for a fixed period, whether injured or not, it would defeat the object of the Act to give him compensation, because there is no loss of wages for which to compensate him. If this had been the case of an ordinary workman I think it clear that the county court judge must have had regard to the full payment of his wages for a time since the accident; the mode and extent of such regard are left to the county court judge, and we are not concerned with any question of that sort. But in the present case the county court judge has refused to have regard to such payment on the ground that paragraph 3 does not apply to the case of a sailor by reason of s. 7, sub-s. 1 (*c*), of the Act. I start with the proposition that it is clear that paragraph 3 applies to all other workmen who have been paid their wages for a time in full since the accident, and the only question is whether s. 7 makes any

difference in the case of a sailor. In my opinion it does not. Sailors were not within the former Act at all, and an injured sailor stands on a different footing from other workmen in that he is, in a case like the present, entitled by statute to maintenance and medical attendance at the expense of his employers for a certain time. If the maintenance and medical attendance received by the sailor in this case had been received by an ordinary workman the county court judge must have had regard to it in fixing the amount of compensation as a benefit or allowance. But on the true construction of the Act and Schedule together I think it is plain that this is not the case with a sailor. Sect. 7 itself has regard to this maintenance by providing that the weekly payment shall not be payable in respect of the period of such maintenance; it treats such maintenance as the equivalent of the weekly payment during its continuance, but it says nothing as to wages. It is true that the payment of wages may extend to the same period, but such wages arise from a contractual, not a statutory, provision; the Merchant Shipping Act, 1894, indeed, provides that the costs of maintenance shall not be deducted from the wages, and, by s. 158, that they shall continue for a certain time, but that is to leave the wages untouched and unaffected, not to create a statutory obligation to pay them; the obligation to pay arises from contract; the inability to set off or terminate before a given day is statutory. The seaman sues for his wages on his contract; the employer is forbidden by statute to set off or counterclaim for the maintenance, or to plead determination of the contract before a certain day. It is said that the period of incapacity in paragraph 3 means the period during which the sailor is in receipt of compensation, but I cannot so read the paragraph. There is only one period of incapacity mentioned in the Act—it is the period during which the man is disabled from earning his full wages at his work. This is the same in the case of a sailor as in all other cases. Sect. 7, sub-s. 1 (*a*), mentions expressly "where the accident happened and the incapacity commenced on board the ship," and (*e*) treats the weekly payment as an existing amount which is not to be paid in respect of the period (i.e., of incapacity) when the seaman is maintained. This seems to be in accordance with justice; the

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

employer loses the benefit of the sailor's services and has to maintain him and give him medical attendance as well. From the time when this maintenance and attendance cease the sailor is in the same position as any other workman, and gets compensation subject to the same provisions as all other workmen.

KENNEDY L.J. I greatly regret that I have not been able to come to the same conclusion as the Master of the Rolls and Farwell L.J.

In this case the appellants, the owners of the steamship *Tintoretto*, ask the Court to reverse a judgment of the Liverpool County Court, whereby it was decided against them that, in assessing the weekly payment to be made under the Workmen's Compensation Act, 1906, to a seaman who has been incapacitated by injury in the service of the ship, the arbitrator ought not to have regard to wages received by the seaman after his injury, but before the commencement of the period in respect of which compensation is to be paid to him under the statute.

Before referring to the few material facts and stating my reasons for upholding the judgment appealed against, I deem it well to cite in close connection the relevant parts of the Merchant Shipping Acts, 1894 and 1906, and the Workmen's Compensation Act, 1906. Our decision of this appeal depends upon the interpretation of those statutes when fairly read and considered together. The important terms of a seaman's employment on board a British ship, except in regard to his station, the rate of remuneration, and the period of his service, are prescribed by the Merchant Shipping Acts. They are in no sense matter of voluntary arrangement. Under s. 113 of the Merchant Shipping Act, 1894, the master of every foreign-going ship must enter into an agreement with every seaman in accordance with that Act. The agreement of service itself must be in a form approved by the Board of Trade (s. 114); and any Court, in the case of a dispute between the owner or master of a ship and a seaman, is empowered by s. 168 to rescind any contract between the parties. By s. 158 of the Act of 1894 it is enacted in regard to seamen who in the course of the voyage become incapable through injury or sickness that "where the service of a seaman terminates before the

date contemplated in the agreement by reason . . . . of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, *he shall be entitled to wages up to the time of such termination, but not for any longer period.*" The method of payment in such a case, either to the seaman himself if he is left in a British possession or, if he is left elsewhere, to the British consular officer, is prescribed by the Merchant Shipping Act, 1906, ss. 38 and 39, which it is unnecessary to quote. By s. 160 of the Merchant Shipping Act, 1894, "where a seaman is by reason of illness incapable of performing his duty, and it is proved that the illness has been caused by his own wilful act or default, he shall not be entitled to wages for the time during which he is, by reason of the illness, incapable of performing his duty"; otherwise, of course, the seaman is, notwithstanding incapacity through illness, entitled under s. 158, which I have just quoted, to his agreed wages, until the date of his discharge if he is discharged abroad before the termination of the voyage, or, if he is kept on board his ship until its return to the home port, until its arrival there and the consequent termination of his engagement. So much for the matter of the seaman's wages.

But the Merchant Shipping Acts of 1894 and 1906 have also dealt with the question of the surgical and medical expenses of the injured seaman and of his maintenance, and, if he is discharged abroad before the termination of the voyage, of the cost of his conveyance to a "proper return port." The provision now in force is s. 34 of the Merchant Shipping Act, 1906. That section, so far as it affects the present case, in substance enacts that if a seaman receives any hurt or injury in the service of the ship or suffers from any illness, except in the case of venereal disease or illness due to the seaman's wilful act, default, or misbehaviour, all the above-mentioned expenses are to be defrayed by the owner of the ship, without any deduction on that account from the seaman's wages, until his return to a proper return port.

It is clear, and, in considering the combined operation of these enactments and the sections of the Workmen's Compensation Act, 1906, to which I shall presently refer, it is important to bear in mind, that in no case can the incapacitated seaman remain

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Kennedy L.J.

entitled under these enactments to payment of wages for any period of time beyond that during which he is under these same enactments entitled to maintenance. If after his injury, although incapable of work, he is kept, either by the wish of the master, or, as for example where his ship does not touch at any intermediate port after the date of his injury, by the force of circumstances on board his ship until her return to a home port, the right to wages and the right to maintenance synchronize in regard to the point of termination. If, on the other hand, as has in fact happened in the case before us, the injured seaman is, in the course of the voyage, put ashore and discharged abroad on account of his hurt, then, under the Merchant Shipping Act, 1894, s. 158, his right to wages ends there, but his right to maintenance, without deduction from his wages, extends until his arrival home at a "proper return port."

Such being the position of the injured seaman under the Merchant Shipping Acts of 1894 and 1906, we have now to consider and interpret in conjunction with those statutes the Workmen's Compensation Act of 1906, whereunder seamen became for the first time entitled to compensation as "workmen" in respect of injury by accident arising out of and in the course of their employment.

The only portions of this Act to which, in respect of the present case, it is necessary to refer particularly are s. 7, sub-s. 1 (*e*), and Sched. I., paragraph 3. Sect. 7, sub-s. 1 (*e*), provides that "in the case of an injured seaman the weekly payment shall not be payable in respect of the period during which the owner of the ship is under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured seaman."

This enactment establishes a difference to their great disadvantage between the treatment under this Act of seamen and the treatment of all other workmen. Whereas, in the case of every other workman, if the incapacity for work lasts for more than two weeks, the weekly payment of compensation is payable in respect of the whole period of the incapacity from its commencement, the seaman rendered incapable for work by injury in the service of his ship, whether he is discharged abroad or kept on

board the ship, is debarred, by this express enactment relating to seamen only, from obtaining payment of compensation in respect of any part of the period of incapacity for work, however long, which precedes his return to the "proper return port," where his right to maintenance ends. The payment of wages, as I have already said, must also in any case end then; if by reason of his injury he has been discharged abroad, it must under s. 158 have ended long before.

We now come to Sched. I., paragraph 3, of the Workmen's Compensation Act, 1906. It provides that "in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity."

It is to be noted, in respect of this last enactment, first, that it is of *general* application and applies to the case of all workmen; secondly, that its operation is not permissive, but compulsory. Its language is "regard *shall* be had"; so that, if it be proved that the workman during the period of his incapacity receives any payment, allowance, or benefit from his employer (we shall have hereafter to consider the true meaning of these words), the county court judge, in fixing the weekly payment, must, on account of such payment, allowance, or benefit, make some deduction from, or reduction of, the sum which he would otherwise order to be paid as compensation.

The material facts to which these statutory provisions have in the present case to be applied are few and simple. The applicant for compensation was a seaman serving on board the respondents' steamship *Tintoretto*, under an engagement for a voyage not to exceed three years and to terminate at a port in the United Kingdom or Continent within home trade limits. He broke his thigh in the service of the ship on December 21, 1908. On December 29 he was by reason of his injury duly discharged at New York, and his wages to date were paid, through (presumably) the consular officer there in accordance with statutory requirements. The sum so paid included the wages due for the period of eight days between December 21, the commencement of his incapacity, and December 29 when he was discharged at New York, and these amounted to 1*l.* 11*s.* 4*d.* Further, in accordance

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Kennedy L.J.

with the statutory requirements which I have cited, the respondents defrayed, without deduction from wages, the surgical and medical expenses of the applicant and the cost of his maintenance and conveyance home to the United Kingdom, where he arrived, in a crippled condition and incapable of work, on March 11, 1909. Had the applicant been a workman of any other sort he would have been entitled to compensation in respect of the whole period from December 21 till March 11, as well as afterwards. But according to the special provisions of s. 7, sub-s. 1 (*e*), the applicant, being a seaman, could not obtain the payment of compensation under that Act in respect of any portion of the period of incapacity—upwards of ten weeks—which preceded his arrival in the United Kingdom on March 11 last, when the liability of the respondents, under the provisions of the Merchant Shipping Acts, to defray his expenses of maintenance terminated. But the respondents further assert that, by virtue of Sched. I. of the Workmen's Compensation Act, 1906, paragraph 3, the county court judge, in fixing the amount of the weekly payment during the period of incapacity, dating from March 11, 1909, "shall have regard," by way of deduction from or reduction of the weekly compensation to be fixed in respect of the period of incapacity after March 11, 1909, to the sum of 1*l.* 11*s.* 4*d.*, included, according to the provisions of the Merchant Shipping Acts, in the payment of wages to the applicant at New York on December 29, 1908, because, as they contend, it falls within the description of a payment which the applicant has received from the employer during the period of his incapacity. There is no doubt that he did receive this sum of 1*l.* 11*s.* 4*d.* as a payment of wages in respect of the first eight days of his incapacity, and that, according to the literal meaning of the words, he received the payment "during the period of his incapacity" when he received it at New York on December 29, 1908.

The learned county court judge, in a considered and closely reasoned judgment, has rejected this contention of the shipowners, and, in my judgment, he was clearly right in doing so. It is, I conceive, incontrovertible that in dealing with the application of a section of a statute where there is an ambiguity in the language one ought to choose the interpretation which will not work

injustice, and which best accords with the intention of the Legislature as it appears in other portions of the same statute. In the present case it appears to me that to apply Sched. I., paragraph 3, as the respondents propose, both involves unfairness in the operation of the Act in regard to seamen and deprives s. 7, sub-s. 1 (*e*), of its natural import and significance. Every workman whose incapacity lasts more than two weeks, except a seaman, gets under this Act a weekly payment of compensation dating from the first day of his incapacity; a seaman, under s. 7, sub-s. 1 (*e*), is excluded from any compensation until—to paraphrase the language of that section according to what is, in my view, its true meaning and effect—all the advantages which the Merchant Shipping Acts give to the injured seaman have ended. In the present instance if the applicant had been a workman of any other sort he would have been entitled to weekly payments of compensation under the Workmen's Compensation Act, 1906, from December 21, 1908. Because he is a seaman he is debarred by s. 7, sub-s. 1 (*e*), from claiming payment of compensation for any period before March 11, 1909, and so loses more than ten weeks of compensation which every other workman could get. And yet, if the respondents are right in their application of Sched. I., paragraph 3, when the arbitrator under the Workmen's Compensation Act, 1906, comes to assess the weekly payment payable only from that later date, he is bound either further to postpone or to reduce the amount of the weekly payment dating from March 11, 1909, by "having regard" to statutory advantages conferred by the Merchant Shipping Act upon a sick or crippled seaman in the course of the period preceding that for which he can be compensated, the existence of which advantages, in my humble judgment, constitutes the only intelligible reason and the only apparent justification for the postponement by the Legislature of the seaman's enjoyment of the benefits of the Workmen's Compensation Act until after, and often, as in the present case, long after, the date when they would have been enjoyed by every other workman. I entirely agree with the learned county court judge that in this way, that is, by the operation of s. 7, sub-s. 1 (*e*), the Act has itself provided the means by which regard is had to the payments, allowances, or benefits which the seaman has

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Kennedy L.J.

received from the shipowner by virtue of that shipowner's statutory obligations. If it had not been intended, says the learned judge, that the postponement should have this effect, there was no need to provide the postponement. It might have left the seaman's right to compensation to come into force as from the date of the injury, leaving the employer to rely in the case of the seaman, as he has to rely in the case of all other workmen, upon Sched. I., paragraph 3. I do not forget that the respondents in this case claim only that the wages paid to the applicant during the period of his incapacity should be taken into account, and make no such claim as to the payments for maintenance or for surgical and medical expenses down to March 11, 1909, which the employer had to make. I am not surprised at their shrinking from such a contention. The cost of maintenance for more than ten weeks would make so formidable a deduction from the weekly payments which commence from its termination as to bring into startling relief the practical result of their construction of the Act. But, if we regard the working of Sched. I., paragraph 3, I cannot find a single word which distinguishes a statutory payment of wages during the period of incapacity from a statutory payment for maintenance during the same period. The words "payment, allowance, or benefit" are equally applicable to both wages and maintenance. If the payment of 1*l.* 11*s.* 4*d.* to the applicant for wages between December 21, 1908, and December 29, 1908, falls within the words of Sched. I., paragraph 3, as a "payment, allowance, or benefit received by him during the period of incapacity," so, beyond controversy, does the payment to him for maintenance during the far longer period of incapacity which extended from December 21, 1908, to March 11, 1909. Both must fall, if either falls, within the direction to "have regard to any payment, allowance, or benefit" received during the period of incapacity. If we turn to the only other part of the Act affecting the question of the seaman, namely, s. 7, we find, I think, no warrant whatever for any distinction, so far as the consideration of either wages or maintenance as a ground for deduction from or reduction of weekly payments of compensation from the date fixed by the section as to the commencement for such payment is concerned. What

we do find, I think, if we read s. 7 fairly and consider its proper import in connection with the statutory rights of the seaman under the Merchant Shipping Acts to which it refers, is that the Legislature, recognizing the position or advantage given by those Acts in regard to wages and maintenance and in consideration of them, deprives the seaman of any participation in advantages of compensation which it gives to any other workman from the commencement of his incapacity. The seaman is to get nothing until the period of his statutory advantages under the Merchant Shipping Acts is over. The terms of the section are so plain and precise that no other meaning can reasonably be placed upon them, and we ought not to draw the harsh inference that the statute, presumably intending to deal with all workmen as equally as possible, has not only postponed the seaman's right to any compensation under s. 7, but further brought into account, as reducing his compensation, when it does begin, statutory benefits which he has received during the period in respect of which he, and he alone, is excluded from compensation. It conveniently fixes the commencement of the seaman's compensation by the date of the cessation of the shipowners' statutory liability to provide for his *maintenance*, because, as I have already said, the right of the seaman, although disabled, to the payment of wages cannot under the Merchant Shipping Acts extend *beyond* the period of statutory maintenance, and may, and indeed most frequently, as in this very case, does cease long before that period comes to a termination under the Merchant Shipping Act provisions which I have cited. And yet this is the construction of the Act for which the appellants argue.

There remains, of course, still to be considered that which is a vital question. Granted that the result of the application of the Workmen's Compensation Act for which the appellants argue is apparently inequitable towards the seaman, granted also that the intention of the framers of the Act, as one may gather it from the special provision for the case of seamen in s. 7, sub-s. 1 (*e*), is adverse to such an application of the Act, still the Court must be satisfied that the enactment of Sched. I., paragraph 3, can reasonably and without any unwarrantable straining of its

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Kennedy L.J.

language be construed so as not to include under the words "payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," and to which, according to the same enactment, regard shall be had in fixing the amount of the weekly payment, the payment to the applicant of his eight days' wages on December 29, 1908. The proper function of a Court of law is to interpret a statute, and one cannot be too careful not indirectly to usurp the functions of the Legislature by giving to the provisions of a statute a meaning which cannot fairly be extracted from the language of those provisions. I think there are two feasible modes of so construing the enactment. The first is to interpret the words "the period of his incapacity" as meaning the period of his incapacity in regard to which the weekly payment has to be fixed. As the weekly payment has not to be fixed, because, under s. 7, sub-s. 1 (*e*), it is not payable, in the case of a seaman, in respect of so much of his period of incapacity as precedes the termination of the period of statutory maintenance, and as the payment to the applicant was made during the period of his statutory maintenance, the suggested interpretation would sufficiently support the applicant's case. I agree with appellants' counsel that it is not free from objection. One result of the interpretation would be to exclude the operation of the enactment in the case of a payment made by the employer during the first week of a workman's incapacity where the whole period of incapacity is less than two weeks. Another result would be, in the case of a seaman, to exclude from the operation of the enactment a voluntary gift, such as might be made before the weekly payment became payable under s. 7, sub-s. 1 (*e*), by the shipowner to the injured seaman where his hurt had been caused in the performance of some conspicuous act of valuable service to the ship. I think that the suggested interpretation of the sentence is, in so far as it would produce the exclusion of these payments from the operation of the enactment, open to objection; but, seeing how rarely the hypothetical case would occur in practice, the objection is not so great as to prevent my preferring even this suggested interpretation of the enactment to that which the appellants advocate: It is to be remembered that the words "any payment . . . . which

the workman may receive from the employer during the period of his incapacity" cannot reasonably be construed according to their absolutely literal meaning. If so construed they would include a payment made by the employer after the date of the workman's injury in discharge of a liability for wages incurred by the employer for work done by the workman before he was injured; and to enact that in fixing the amount of the weekly compensation the arbitrator shall have regard to such a payment, which, though due before the accident, either by oversight or through some dispute between employer and workman happens to have been deferred until after the period of the workman's incapacity has begun, would plainly be absurd.

I prefer, however, to base my judgment that this appeal should be dismissed upon a different, broader, and, in my humble opinion, a better ground. I hold that the Legislature ought not to be taken, in passing this enactment of Sched. I., paragraph 3, to have intended inferentially to modify, adversely to the workman's interest, the force of pre-existing statutory enactments by which, at the time of the passing of the Workmen's Compensation Act, he was benefited, as the seaman was by the enactments of the Merchant Shipping Acts; further, that in the case of the seaman s. 7, sub-s. 1 (*e*), contains all the limitation or qualification which the Legislature can rightly be understood as placing upon his enjoyment of the benefit of compensation under the Workmen's Compensation Act, 1906, as well as of, and in addition to, the advantages conferred upon him by the Merchant Shipping Acts; and that the intention of the Legislature, which is plainly shewn by s. 7, sub-s. 1 (*e*), as well as an equitable adjustment of the rights of employer and employed generally, in regard to fixing the amount of weekly payments under Sched. I., paragraph 3, is effectuated, if we read it, as I think we may without violence to the text or the contravention of any canon of construction, as not applying to statutory payments, or statutory allowances or statutory benefits, but applying only to the advantages received by the workman during his incapacity which proceed from the voluntary action of the employer, whether by way of pure gift or of contract, as, e.g., where the terms of employment give a payment to the workman for some period after the

C. A. 1909

McDERMOTT v. OWNERS OF S.S. TINTORETTO.

Kennedy L.J.

capacity for work has been terminated by the workman's bodily injury.

I am sorry to have been obliged by the importance of this question both to shipowners and to seamen and by the fact of a difference of opinion on the part of my colleagues (which, of course, makes me diffident of the soundness of my own) to deliver a judgment longer than I should have otherwise wished.

Appeal allowed.

Solicitors: *Botterell & Roche, for Weightman, Pedder & Co., Liverpool; Windybank, Samuell & Lawrence, for Fox & Bradley, Liverpool.*

H. B. H.

C. A. 1909

June 28, 29.

[IN THE COURT OF APPEAL.]

READ AND ANOTHER *v.* PRICE AND ANOTHER.

Limitations—Specialty Debt—Bond—Joint and several Liability—Acknowledgment in Writing—"Party liable by virtue of such specialty"—Acknowledgment by one of several Obligors—Lost Acknowledgment—Parol Evidence—Onus of Proof—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, *c.* 42), *ss.* 3, 5.

An acknowledgment in writing by one of several obligors is an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, so as to take out of the operation of s. 3 of that Act an action founded on the liability of the surviving obligors, and stands on the same footing as payment.

Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost. Onus of proof discussed.

Decision of Channell J., [1909] 1 K. B. 577, affirmed.

APPEAL from a decision of Channell J. (1)

The action was brought by Elizabeth Read and Edward Adolphus Buchanan as the representatives of John Augustus Read, deceased, against Frederick George Hilton Price and Sheldon Dudley Driver to recover a principal sum and interest upon a bond.

The bond was dated June 28, 1879, and by its terms Vincent Bailey, Frederick George Hilton Price, Sheldon Dudley Driver,

(1) [1909] 1 K. B. 577.

John George Sebright, and Ernest Ibbotson were held and firmly bound unto John Augustus Read in the sum of 2000*l.* to be paid to the said John Augustus Read, his executors, administrators, and assigns. Then followed these words: "for which payment to be well and truly made we bind ourselves and each of us and the heirs executors and administrators of us and each of us and of every of them jointly and severally by these presents.

"Now the condition of the above written bond or obligation is such that if the said Vincent Bailey his heirs executors or administrators shall pay or cause to be paid to the said John Augustus Read his executors administrators or assigns the sum of one thousand pounds on June 27, 1881, together with interest thereon in the meantime at the rate of ten pounds per cent. per annum by half-yearly payments on December 27 and June 27 in each year then the above-written bond or obligation shall be void otherwise the same shall be and remain in full force and virtue.

"And it is hereby declared that each of the said obligors shall be held and deemed to be principals as regards the obligee so that if time for payment of principal or interest shall be given to the principal by the obligee it shall not discharge them or either of them."

Vincent Bailey was in fact the principal debtor, and the defendants and the other obligors were his sureties. Of these sureties one had become bankrupt some time before the writ was issued and was not concerned in this action; another was in the year 1884 released by a deed with the assent of all the parties interested. John Augustus Read died on June 21, 1888, having by his will appointed the plaintiffs executrix and executor, the plaintiff Elizabeth Read, his widow, being the person beneficially entitled to the principal sum and interest on the bond.

The parties remaining liable on the bond being Bailey, as principal debtor, and the defendants, as his sureties, the former paid interest to Mrs. Read down to June 28, 1905. The half-year's interest due at Christmas, 1905, was not paid, and Bailey died on January 26, 1906. His estate was then found to be

C. A. 1909

READ v. PRICE.

insolvent. His executor acknowledged the debt in two affidavits, one made for the purposes of probate and the other in an administration action in the Chancery Division.

The writ in this action was issued on March 10, 1908, against Price and Driver to recover the principal sum and interest. The defendants pleaded that the action accrued more than twenty years before the issue of the writ and was barred by s. 3 of the Civil Procedure Act, 1833. The plaintiffs in reply relied upon the acknowledgments given by Bailey's executor as aforesaid as operating by virtue of s. 5 of the Act to keep the right of action alive.

It appeared, however, at the trial that the payments made as aforesaid to Mrs. Read by Bailey in his lifetime had always been made by cheques enclosed in letters. Mrs. Read in her evidence stated that she generally, if not always, found it necessary to apply twice for payment of the interest, and that she constantly received letters from Bailey excusing delay in payment and containing promises to pay in a week or a fortnight or within some other period, as the case might be; that these letters contained acknowledgments, the precise words of which Mrs. Read did not profess to remember, that the bond was in existence; these letters did not always refer to the bond, but always referred to the interest. Mrs. Read stated that she never kept letters and had destroyed these letters, being under the impression that if she kept the bond in her possession and got payment of the interest the principal sum was safe.

In view of this evidence counsel for the plaintiffs asked for and obtained leave at the hearing to amend the reply so as to enable them to rely on these letters of Bailey as acknowledgments in writing of the bond debt made within twenty years of the date of the writ in the action.

Channell J. held (1.) that the executor of a deceased obligor was not jointly liable with the surviving obligors; (2.) that an acknowledgment in writing by the executor of a deceased obligor was not an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833; but (3) that parol evidence was admissible to prove the contents of a written acknowledgment which had been lost, and that

in this case there were written acknowledgments within the period of twenty years before the commencement of this action made by Bailey himself, who was when he made them jointly liable with the defendants, and therefore a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley* (1); and consequently that on the case set up in the amended reply the plaintiffs were entitled to recover.

From this later portion of this judgment the defendants appealed.

C. A. Russell, K.C., and *Rayner Goddard*, for the defendants. Since the hearing of the case in the Court below certain letters from Vincent Bailey to Mrs. Read have been discovered to which the attention of the Court ought to be called, and which it is now proposed to put in as evidence.

Boxall, K.C., for the plaintiffs, objected to these letters being put in evidence.

[COZENS-HARDY M.R. We propose to look at these letters de bene esse, giving the plaintiffs' counsel an opportunity later on, if necessary, of testing their authenticity by cross-examination. Meantime the argument had better proceed on the same materials as in the Court below.]

C. A. Russell, K.C., and *Rayner Goddard*, for the defendants. Any acknowledgment to take the case out of the Statute of Limitations under s. 5 of the Civil Procedure Act, 1833 (2),

(1) 1 De G. & J. 1.

(2) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3: "All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance . . . . that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after . . . ."

Sect. 5: "Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due

C. A. 1909

READ v. PRICE.

must be in "writing signed by the party liable . . . . or his agent," and no writing is produced here.

Parol evidence of the contents of the letters written by Bailey to Mrs. Read is not admissible. To admit such evidence is to defeat the intention of the Legislature, which is that the acknowledgment, to be effective, must be written, not oral. Here even if this evidence is admitted it is not sufficient to establish an acknowledgment that the bond debt was still due and owing. These letters were sent with the cheques and are merely incidental to the payments and have no greater force than the payments themselves, which by s. 14 of the Mercantile Law Amendment Act, 1856, are ineffectual against co-debtors. *Cockrill* v. *Sparkes* (1), relied on by Channell J., has no bearing on this point. Besides, there is nothing in these letters to identify the cheque sent in payment with the bond.

[*Boxall, K.C.*, for the plaintiffs. The onus is on the defendants to shew that there is another bond to which the payment could be referred: *Baillie* v. *Lord Inchiquin* (2); *Spickernell* v. *Hotham.* (3)]

Baillie v. *Lord Inchiquin* (2) is treated as overruled in *Routledge* v. *Ramsay.* (4) It is admitted that the acknowledgment must not be a promise to pay, but it must be something more than a mere covering letter with the cheque, as these letters were.

The doctrine of *Roddam* v. *Morley* (5) must be limited to the case of payment by one of several obligors; there is no reported case where that doctrine has been applied to an acknowledgment by one of several obligors. Payment enures for the benefit of all persons liable, so that it is not perhaps unfair to say that a

thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, ... and the plaintiff or plaintiffs in any such action, on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute."

(1) (1863) 1 H. & C. 699.
(2) (1796) 1 Esp. 435.
(3) (1854) Kay, 669.
(4) (1838) 8 Ad. & E. 221.
(5) 1 De G. & J. 1.

payment made by one of the persons liable should be sufficient to take the case out of the statute; in the case of an acknowledgment its effect is confined to the person who makes it, and it may be a positive detriment to the others if this doctrine is applicable. The distinction between payment and acknowledgment is stated in *Coope* v. *Cresswell*. (1) There being this distinction between payment and acknowledgment, there is no justification for placing upon s. 5 the interpretation given to it by *Roddam* v. *Morley* (2), which dealt only with payments. And as to the case of acknowledgment the judgment of *Coope* v. *Cresswell* (3) is still good law, though as far as it deals with payment it cannot now be accepted. The letters of the debtor ought not to stand on the same footing as payments; it is not in accordance with the language of s. 5 that they should. [*Bradshaw* v. *Widdrington* (4) was also cited.]

Boxall, K.C., and *E. E. Humphrys*, for the plaintiffs.

[COZENS-HARDY M.R. We need not trouble you on the question of the admissibility of parol evidence to prove the contents of these acknowledgments.]

It is stated by the judges in *Roddam* v. *Morley* (5) that if one of several obligors were to make the requisite acknowledgment it has never been disputed that this would be an acknowledgment by "the party liable" within the intention of the statute, and this opinion was concurred in by Lord Cranworth. (6) Sect. 5 must therefore be read as given in Sugden's Real Property Statutes, p. 149—"an acknowledgment . . . . signed by the party or parties liable by virtue of such . . . . specialty . . . . or any of them or his her or their agent." The interpretation of s. 5 as settled by *Roddam* v. *Morley* (2) applies equally to an acknowledgment in writing as to payment.

C. A. Russell, K.C., in reply, said he could add nothing to his previous criticisms of *Roddam* v. *Morley*. (2)

COZENS-HARDY M.R. This is an appeal from a judgment of Channell J., who held that the defendants are liable to pay the

(1) (1866) L. R. 2 Ch. at pp. 123, 124.
(2) 1 De G. & J. 1.
(3) L. R. 2 Ch. 112.
(4) [1902] 2 Ch. 430.
(5) 1 De G. & J. 1, at p. 7.
(6) Ibid. at p. 16.

C. A. 1909

READ v. PRICE.

Cozens-Hardy M.R.

plaintiffs on a bond given jointly by the defendants and certain other persons. It was a joint and several bond.

Three points were raised. The first was that any acknowledgment to take the case out of the Statute of Limitations applicable to the bond must be in writing, and no writing was produced. We did not call upon the counsel for the respondents to deal with that, or with the second point as to the admissibility of parol evidence of the contents of the written acknowledgment, because it seemed to us quite clear that, although the statute says the acknowledgment must be in writing, you may prove the writing in any way. You may prove the existence of the writing by the ordinary law of evidence, and when the writing is lost, and the proof of the loss is satisfactory to the Court, you may give secondary evidence of the contents of the lost document, just as in cases where writing is required under the Statute of Frauds you can always prove the existence of the writing by parol evidence, if proof is given of the loss of the written document. So here the learned judge decided that parol evidence was admissible. He then heard the evidence of Mrs. Read, who deposed to letters which she had received from time to time from Vincent Bailey, one of the obligors, who in answer to her periodical requests for payment wrote letters to her acknowledging the existence of the debt in a highly satisfactory way, by sending a letter with a cheque for interest. The learned judge was satisfied of the credibility of the lady who gave this evidence, and there is no suggestion whatever to impeach her testimony in any way. I think there was ample evidence to justify the learned judge in coming to the conclusion at which he arrived, that although the letters were not forthcoming, there was sufficient secondary evidence of the contents of the letters given by the person who had received them. We have looked, without having them put in evidence, at certain documents which Mr. Russell has most properly brought to the attention of the Court; but in my view, even if they were admitted as evidence, they would not in any way affect the decision which, upon the materials before Channell J., was arrived at.

That leaves only the third point, and it is a point upon which we have heard a very elaborate argument, and it is this: Given

C. A.
1909
READ
v.
PRICE.
Cozens-Hardy M.R.

a case of several joint and several obligors, what is the effect of an acknowledgment in writing given by one of those co-obligors within the statutory period before the action brought against another obligor. It is not suggested that any acknowledgment has been given by the defendants in this action, nor that any payment of interest has been proved, but it is said there has been an acknowledgment by a co-obligor, and that that suffices to prevent the statute being available as a defence to this action.

That turns solely upon the construction of ss. 3 and 5, and especially s. 5, of the Civil Procedure Act, 1833. Sect. 3 provides that actions upon a specialty (I am reading it shortly) shall be brought within a certain period—twenty years then, I think it is now reduced to twelve. But then there is this proviso by s. 5: "Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid." It is quite obvious that this proviso is not happily framed. In terms it contemplates one person being liable—"the party liable . . . . or his agent." It seems for the moment to have forgotten the case of co-obligors and not to make any provision for them. But this section has been dealt with by Courts of the highest possible authority for now more than half a century, and I think it would be wrong for us to listen to the very ingenious argument which we have heard from Mr. Russell based upon the point which I will now endeavour to put as he put it. In *Roddam* v. *Morley* (1), which was decided in 1857 by Lord Cranworth, assisted by two very eminent judges of the Common Pleas, namely, Williams and Crowder JJ., it was decided that payment of interest by a tenant for life kept alive the specialty as against the tenant in tail in remainder.

(1) 1 De G. & J. 1.

C. A. 1909

READ v. PRICE.

Cozens-Hardy M.R.

It is quite true that that is only under what I may call the second limb of the section, which was payment of interest. There have been a number of subsequent authorities, several of them in the Court of Appeal, and many in other Courts, and finally there was the case of *In re Lacey* (1) in 1907, in which the Court of Appeal applied that doctrine again to the case of payment, but a case of payment where the payment of interest was by a devisee of property subject to a mortgage, and that payment was held to prevent the statute being available in favour of other devisees of other land devised by the covenantor. Mr. Russell says that doctrine is all very well if you limit it to the case of payment of interest, because payment of interest is something which enures for the benefit of all persons liable, and, therefore, it is not unfair to say that a payment made by one of the persons liable should be sufficient to take the case out of the statute. Can that reason apply to a mere acknowledgment by one of the persons liable, an acknowledgment which he says cannot in any way enure for the benefit or be construed to be for the benefit of the other persons, because acknowledgment must really be to the detriment of the other persons? I am not at all satisfied that I do not see an answer sufficient to that argument apart from authority; but in a case of this kind, dealing with the Civil Procedure Act, 1833, and dealing with a case which has been before all the Courts and before this Court for more than half a century, I think it would be dangerous in the last degree to depart from what has been laid down.

To my mind it is inconceivable that, when the Legislature enacted that either an acknowledgment or a payment should take a case out of the statute, the acknowledgment must not be contemplated as being given by a person in the same position as the person who makes a payment, and that, I think, is in accordance with the authorities.

In *Roddam* v. *Morley* (2) the learned judges, who gave their opinion to the Lord Chancellor, in language which was perfectly free from ambiguity, said that it did apply to an acknowledgment by one of several. I will only read one or two

(1) [1907] 1 Ch. 350. (2) 1 De G. & J. 1.

passages of that judgment. It says (1): "The section speaks of 'the party liable or his agent.' But it has never been suggested that the operation of the section is to be confined to the single case thus contemplated, nor has it been at all doubted, either at the Bar or on the Bench, but that the Act extends as well to the case of a bond with several obligors as also to a case where the liability has been transferred by death to a representative of the party originally liable." Observe the actual case. Then they go on: "If one of several obligors were to make the requisite acknowledgment, it has never been disputed that this would be acknowledgment by 'the party liable' within the intention of the statute, whatever controversy there may have been as to the effect of such an acknowledgment. If this be so, then it follows that the words 'the party liable or his agent' are to be read as if they were the party or parties liable by virtue of the bond, &c., or any of them, or his, her or their agent." I point out that those words which the learned judges say are to be read into the section are words which are to be read into the first limb of the section, namely, into what I ventured to call the acknowledgment limb, and not the payment limb; for, as Mr. Russell in the course of his very forcible argument has pointed out, it is only in that limb that you find the words expressed—"the party liable or his agent." So that the learned judges treated the case as clear under the acknowledgment part in the case of two obligors, and went on to give a very learned opinion as to the second branch where the liability has been transferred by both to other persons.

Then how does it stand with reference to the Lord Chancellor (Lord Cranworth) with regard to the case before him. In his considered judgment he says (2): "After much consideration I concur, not only in the result at which they arrived, but also in the reasoning which led them to their conclusions." So that that is a confirmation by the Lord Chancellor of the views expressed by the learned judges. Of course it is only dictum, I agree, but it is a dictum of the very highest authority dealing with a matter of the utmost importance. Then later on the Lord Chancellor makes this, if possible, still

(1) 1 De G. & J. at p. 7. (2) Ibid. at p. 16.

C. A. 1909

READ v. PRICE.

Cozens-Hardy M.R.

more clear. He says (1): "The statute, as is observed by the learned judges, must have been intended to meet the case of several persons liable as well as that of a single obligor, and it never could have been contemplated that, in order to prevent the operation of the statutory bar, there must always be an actual payment by all persons liable." Against that there is the dictum of Lord Chelmsford in *Coope* v. *Cresswell* (2), but it is a dictum which, as I ventured to suggest to Mr. Russell, makes a very feeble foundation for an argument to rest upon. Lord Chelmsford said payment and acknowledgment must stand on the same footing. They must be by the same person, and the payment, to take the case out of the statute, must be a payment by the person sought to be charged, and the acknowledgment must be an acknowledgment by the person sought to be charged.

Now the first limb of that proposition is absolutely inconsistent with *Roddam* v. *Morley* (3); it is inconsistent with the subsequent decision in the Court of Appeal in *In re Lacey* (4); and it is therefore an authority which cannot in my judgment be regarded as at all approaching in weight the authority of the learned judges and the Lord Chancellor in *Roddam* v. *Morley*. (3)

But it does not rest there. Mr. Russell is entitled to say, as he did very forcibly, that there is no reported case in the books in which the principle of *Roddam* v. *Morley* (3) has been applied to the case of an acknowledgment in writing. The case has not, so far as I am aware, arisen before, but there is an authority which all Courts have treated as of great weight. I refer to what Lord St. Leonards in his book on the Real Property Statutes (2nd ed.) says. Dealing with this very point he says (p. 149): "Great difficulty has arisen from the framers of the Act having had in their mind the single case of a sole obligor, and the case of a bond with several obligors, or of a deceased obligor, never occurred to them; accordingly the section speaks of 'the party liable or his agent.' But the operation of the Act is not confined to the single case thus contemplated: it extends as well to the case of a bond with several obligors, as to the case where the liability has been transferred by death to a

(1) 1 De G. & J. at p. 18;
(2) L. R. 2 Ch. 112, 123.
(3) 1 De G. & J. 1.
(4) [1907] 1 Ch. 330.

representative of the party originally liable. The words, 'the party liable or his agent' are to be read as if they were 'the party or parties liable by virtue of the bond, &c., or any of them or his, her, or their agent.'"

In the face of these authorities, I can only arrive at this conclusion, that we should be making a distinction altogether without warrant if we said that a payment of interest by one of the obligors would suffice to take the case out of the statute, but that an acknowledgment in writing by one of the obligors will not. I think it is absolutely necessary for us, if we put those words into the section for one purpose, to put them into it for the other. This was the view of the section taken by Channell J., and for the reasons already given I think his decision is right and I entirely agree with his judgment. The appeal must be dismissed.

FARWELL L.J. I agree.

It must now be taken as settled that a payment by one of several co-obligors or joint debtors in the position of the parties in *Roddam* v. *Morley* (1) or in *In re Lacey* (2) binds the others, unless s. 14 of the Mercantile Law Amendment Act, 1856, applies to the case, but it is argued that that rule does not apply to an acknowledgment in writing signed by one only of the parties liable, and Mr. Russell has commented on the elaborate reasons given by the various judges who gave judgment in *Roddam* v. *Morley* (1) and *In re Lacey* (2) to shew that their reasoning does not apply to such an acknowledgment. I do not know that the reasons given by the judges necessarily affect the construction of the Act of Parliament merely because those reasons do not fit every limb in the section; but if it be necessary to find some possible common benefit as a foundation for holding that an acknowledgment stands on the same footing as payment, I think it may be found in this, that the giving of an acknowledgment may well prevent an immediate action from being brought, and may therefore be a sufficient benefit for all persons liable. I do not however think it is necessary to find any reason for it, because the words of the Act prevent our coming to a conclusion in Mr. Russell's favour. It is to be observed that s. 5 contains

(1) 1 De G. & J. 1. (2) [1907] 1 Ch. 330.

C. A. 1909

READ v. PRICE.

Farwell L.J.

only one reference to acknowledgment: "if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent or by part payment." It certainly would be somewhat remarkable if the same person should not be intended to be the person who is to give such acknowledgment whether it be given by writing or by payment, and the dicta of Lord Cranworth and Williams and Crowder JJ., and the opinion of Lord St. Leonards, appear to me to outweigh the dictum of Lord Chelmsford in the case of *Coope* v. *Cresswell* (1), the decision in which (now overruled) was contrary to *Roddam* v. *Morley* (2), by which, I venture to think, he was bound.

There is one other reason which appears to me to have some weight, and that is one of the reasons—I do not agree with all the reasons given in this judgment—suggested by Kindersley V.-C. in *Coope* v. *Cresswell* (3) in the Court below. He says (4): "What is the language of the 5th section? It shall be lawful for the party entitled to such actions to bring his action within twenty years after such acknowledgment or payment. What action? Surely it must be the same action which he might have brought if the twenty years had not elapsed since the cause of action; and that action he shall still be entitled to bring, notwithstanding twenty years have elapsed since the cause of action, provided within twenty years there has been an acknowledgment or payment. That according to the language used would appear to me to be the fair interpretation of the section, and I see no reason for importing (what the argument of the defendants asks the Court to import), a limitation on the generality of the terms used in this section. I am asked to insert these words: 'It shall be lawful for the party entitled to such action to bring his action against the person who has made the acknowledgment or payment within twenty years.' It is contrary to the plainest course of construction to introduce such language into an Act of Parliament, or any other instrument, unless driven to it by necessity arising out of the context; and I see no such necessity here." That adds another reason

(1) L. R. 2 Ch. 112.
(2) 1 De G. & J. 1.
(3) L. R. 2 Eq. 106.
(4) Ibid. at p. 118.

from an eminent judge in support of the view I take of the construction of this section.

As to the admissibility of the secondary evidence, that question is concluded by authority in the well-known case of *Sugden* v. *Lord St. Leonards.* (1) Cockburn C.J. says this (2): "When the idea of Lord St. Leonards having himself destroyed the will is disposed of, the next question which presents itself is, whether the will having been lost, secondary evidence can be given of its contents. Now that matter is disposed of by the authority of *Brown* v. *Brown* (3), which I think has been recognized as perfectly sound. There Lord Campbell says, 'Parol evidence of the contents of the lost instrument may be received as much when it is a will as if it were any other document,' and in that I, for one, most entirely concur"; and all the other members of the Court of Appeal took the same view.

The only other point is the sufficiency of the secondary evidence. I do not think that there is any general rule that the onus is on one side or the other. *Baillie* v. *Lord Inchiquin* (4) has been overruled, and the true rule is that it depends on the construction of the document when produced or when secondary evidence of its contents have been given, whether the debt to which reference is made in the document is sufficiently identified. I do not think there can be said to be any onus on one side or the other to prove the existence or non-existence of any other debt; it is a circumstance to be considered. It may be that on reading the document it is sufficiently shewn that that is the only possible debt, and that is the case here. It was not suggested in the Court below that there was any other debt, or that that 50*l.* which was sent in these letters as interest was not the interest on this particular debt.

That being so, I see no reason whatever why the judge should not believe the witness, accept her testimony, and give full effect to it as he has done.

I agree that the appeal fails and should be dismissed.

(1) (1876) 1 P. D. 154.
(2) 1 P. D. at p. 220.
(3) (1858) 8 E. & B. 876.
(4) 1 Esp. 435.

C. A. 1909

READ v. PRICE.

KENNEDY L.J. I am of the same opinion.

With regard to the two points that have been raised, besides the effect of s. 5 of the Civil Procedure Act, 1833, I desire to add but little. Farwell L.J. has just referred to a will case; but it is quite clear, apart from any decision upon the particular question of the contents of a lost will, in regard to the exact question here, that the Court ought to admit oral evidence of the contents of any document which is necessary for the case if it be shewn that that document has in fact been lost. In the case of *Haydon* v. *Williams* (1) one of the points raised before Tindal C.J. at nisi prius, and decided apparently to be not worth arguing when it came before the Court in banc, was that, it being a case in which it was necessary for the plaintiff to shew a written promise to pay a debt barred by the Statute of Limitations, and the document on which the party had to rely having been lost, oral evidence of the contents of the writing might not be given. The party who was insisting on the acknowledgment stated that he had received a letter from the defendant which he had since lost and searched for in vain, in which letter the defendant referred to the demand for payment of his debt and said he was incapable then of paying the money, but would do so as soon as he had it in his power, and begged that the instructions given for suing might be countermanded. It was objected on the part of the defendant that oral evidence of an acknowledgment of the debt ought not to be received. It was overruled by the learned Chief Justice, and the admissibility of the oral evidence is treated in the head-note as one of the points there decided.

Upon the second question, namely, what I may call the identification of the acknowledgment of the particular specialty debt in this case, for myself, I think the correct statement of the law would be that it must sufficiently appear as an inference from the circumstances of the case or be expressly proved that the acknowledgment related to the debt in question. In the present case my brother Channell held on the evidence, and I think rightly held, that the acknowledgment in question was sufficiently shewn before him upon the evidence to be an acknowledgment relating to this particular specialty debt.

(1) (1830) 7 Bing. 163.

C. A. 1909

READ v. PRICE.

Kennedy L.J.

Upon the main question which has been argued it appears to me that apart from authority it is reasonably clear that the section in question, that is s. 5 of the Civil Procedure Act, 1833, makes no distinction between an acknowledgment in writing signed as there described, and part payment or part satisfaction. The very able argument of Mr. Russell really would split the section and make a distinction between the effect of the section in regard to the value of the acknowledgment as it is, an acknowledgment by payment, and the effect of the section as an acknowledgment in writing. We have not to legislate, but to construe the section, and construing the section in its ordinary and natural meaning, it puts exactly on the same basis an acknowledgment in writing and an acknowledgment by part payment, and if there is a sufficient acknowledgment by one of several joint obligors, and acknowledgment is sufficient if it is given by payment by one, there is upon the section in its natural meaning no justification for saying that a different meaning or different effect is to be assigned to its language where the acknowledgment is in writing. Indeed the case that has been relied upon by the appellants of *Coope* v. *Cresswell* (1) shews in the judgment of Lord Chelmsford that, whatever may be the correctness or incorrectness, with due respect to the Lord Chancellor, of his judgment in other respects, he recognizes that any acknowledgment and payment of the sum are intended to be placed on precisely the same footing. Directly you have got that, and you have got the ample authority which we have for treating payment as being sufficient if made by one of the several co-obligors, then, even according to the view of Lord Chelmsford, you have no right, according to the construction of the section, to apply it differently where the acknowledgment is by writing signed by the party liable and not by part payment, and, apart of course from the application of the Mercantile Law Amendment Act, 1856, which does not apply to specialty debts, the acknowledgment by the joint debtor keeps the specialty debt alive against all his co-debtors. It appears to me on the authorities that that is the right view. So far as I know, the exact point has never been decided before, and I concur in the reasoning of the

(1) L. R. 2 Ch. 112, at p. 124.

C. A. 1909

READ v. PRICE.

judgments of the other members of this Court, and also the judgment of my brother Channell.

Appeal dismissed.

Solicitors for appellants: *Peacock & Goddard.*

Solicitors for respondents: *Sawyer & Co., for J. C. Buckwell & Co., Brighton.*

W. C. D

1909

July 14, 15.

GRIMSDICK *v.* SWEETMAN.

Landlord and Tenant—Lease—Beerhouse—Covenant by Lessee to use Premises only as Beerhouse—Non-renewal of Licence—Impossibility of performing Covenant — Continuance of Lease—Compensation—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2, *sub-s.* 1.

By an indenture of lease made in 1895 the plaintiff demised to the defendant certain premises described as "all that beerhouse and premises with the bakehouse in the rear" for a term of twenty-one years. The lease contained covenants by the defendant to continue the premises as a beerhouse at all times during the term and not to use the premises or permit them to be used in any other manner than as a beerhouse without the consent of the plaintiff. The house had been licensed as a beerhouse since before the passing of the Wine and Beerhouse Act, 1869. In 1905 the renewal of the licence was refused under the Licensing Act, 1904, on the ground that it was not necessary for the requirements of the neighbourhood, and in August, 1907, compensation was paid to the plaintiff and the defendant.

In an action to recover a half-year's rent due in January, 1908:—

Held, that the non-renewal of the licence had not the effect of putting an end to the lease, and that the defendant was, therefore, liable for the rent.

APPEAL of the plaintiff from the Isle of Wight County Court.

The plaintiff's claim was for a half-year's rent due January 30, 1908, of certain premises.

The action was tried on certain agreed facts, which were as follows: The plaintiff was the owner of premises known as the Seymour Inn, Warwick Street, Ryde, Isle of Wight. By an indenture of lease dated November 15, 1895, he demised the same to the defendant for a term of twenty-one years determinable as therein mentioned at the annual rent of 26*l*. The house was an

1909

GRIMSDICK v. SWEETMAN.

ante-1869 beerhouse. In October, 1905, the licence was objected to on the ground of redundancy, and under the provisions of the Licensing Act, 1904, the licence was taken away and compensation was paid in August, 1907, in the sums of 155*l.* to the plaintiff as owner and 100*l.* to the defendant as tenant. The business of a baker was occasionally carried on at premises at the rear of the beerhouse; but it was not stated at what date this took place, nor whether the consent of the lessor had been obtained. At the date of the commencement of the action the premises were unoccupied; the defendant had tendered possession to the plaintiff, but it had been refused.

The lease demised to the defendant "all that beerhouse and premises with the bakehouse in the rear formerly called the Epping Inn but now the Seymour situate at the west side of Warwick Street Ryde."

The lease contained the usual covenant by the defendant to pay the rent, and covenants that he would "at all times during the said term continue the said premises as a beerhouse and conduct the same in a proper and orderly manner so that the certificate of the justices may not be suspended or refused to be renewed and at the end or other sooner determination of the said term deliver up to the lessor all existing licences of the house on being paid a fair and proportionate sum for the same according to the time then unexpired thereunder And will not without the consent in writing of the lessor assign the said premises or any part thereof or use or permit the same to be used or occupied in any other manner than as a beerhouse or make any alteration in the internal arrangements or in the external appearance of the said premises without the like consent."

The lease contained the usual covenant by the lessor for quiet enjoyment on payment of rent and observation of the lessee's covenants and conditions.

The county court judge held that the premises had been demised solely for the purpose of carrying on the business of a beerhouse, and that, as it had become impossible to carry on that business, the lease must, on the authority of *Taylor* v. *Caldwell* (1),

(1) (1863) 3 B. & S. 826.

1909

GRIMSDICK v. SWEETMAN.

be treated as having been determined, and the defendant was no longer liable to pay the rent. He accordingly gave judgment for the defendant.

The plaintiff appealed.

W. H. S. Garnett, for the plaintiff. The fact that the licence of this house has been taken away, and that consequently the defendant can no longer use the premises for the business of a beerhouse, does not release him from liability under his covenant to pay the rent reserved by the lease during the rest of the term. The premises demised by the lease comprise the house and the bakehouse in the rear, and although the premises are not now available for use as a beerhouse, they are still in existence and are capable of occupation by the defendant. This is, therefore, not a case in which it can be said that there has been a total failure of consideration: *Paradine* v. *Jane* (1); *Gibbons* v. *Chambers* (2); *Newby* v. *Sharpe*. (3) There was no warranty, express or implied, by the plaintiff that the house should continue to be licensed, and although the defendant covenanted to continue the premises as a beerhouse, it is not contended that an action could now be maintained for breach of that covenant, for its performance has become illegal: *Baily* v. *De Crespigny*. (4)

The county court judge thought that the case was governed by *Taylor* v. *Caldwell* (5) and *Krell* v. *Henry* (6), but in both those cases there was no lease, but a mere licence to use certain premises for a certain purpose, and there was a total failure of consideration. On the other hand, *Blum* v. *Ansley* (7) is a distinct authority that where there is a lease of licensed premises the forfeiture of the licence does not put an end to the lease, and *Hart* v. *Arrol* (8) is a Scotch decision to the same effect. Another answer to the defendant's contention is that the amount of the compensation which he has been paid under the Licensing Act, 1904, is based on the difference between the value of his interest in the premises when they were licensed, and as they

(1) (1646) Al. 26.
(2) (1885) Cab. & E. 577.
(3) (1878) 8 Ch. D. 39.
(4) (1869) L. R. 4 Q. B. 180.
(5) 3 B. & S. 826.
(6) [1903] 2 K. B. 740.
(7) (1900) 16 Times L. R. 249.
(8) (1903) 6 F. 36.

now are; the lessor's compensation is for injury to his reversion, not for loss of rent: *Liverpool Corporation* v. *Peter Walker & Son.* (1) [He also referred to *Lumsden* v. *Barton.* (2)]

S. H. Emanuel, for the defendant. The county court judge rightly held that in the event which has happened the lease is at an end. It is not a lease of a house licensed a sa beerhouse, but of a beerhouse. The defendant has covenanted to continue the premises as a beerhouse and not to use them for any other purpose. The house was an ante-1869 beerhouse, and, therefore, the defendant was bound to live in it, but his right to live there and his right to use the bakehouse were merely ancillary to the use of the premises as a beerhouse. After the non-renewal of the licence, and the payment of compensation, the defendant occupied the premises as a tenant on sufferance, or possibly even as a trespasser. He is not entitled to occupy the premises as a private dwelling-house, or to use the bakehouse for the business of a bakery, for to do so would be a breach of his negative covenant in the lease, and the Licensing Act, 1904, would afford no defence to an action for breach of that covenant. The whole object of the lease having been defeated, and it having become impossible for the defendant to use the premises for any purpose whatever, there has been a total failure of consideration and the lease is at an end. With regard to the compensation, if the right view is that the lease is at an end, it must be assumed that the lessor was compensated for the loss of rent, and if he is entitled to judgment in this action he will receive the rent twice over.

DARLING J. This case raises a somewhat peculiar point, and I have come to the conclusion that the judgment of the county court judge cannot be supported. The facts are as follows. In 1895 the plaintiff let to the defendant certain premises which are described in the lease as "all that beerhouse and premises with the bakehouse in the rear formerly called the Epping Inn but now the Seymour." The beerhouse was an ante-1869 beerhouse, and therefore at the date of the lease the licence could not be taken away except upon one of the four grounds mentioned in s. 8

(1) [1908] 2 K. B. 33. (2) (1902) 19 Times L. R. 53.

1909

GRIMSDICK v. SWEETMAN.

Darling J.

of the Wine and Beerhouse Act, 1869. After the passing of the Licensing Act, 1904, the security of the tenure of ante-1869 beerhouses was changed, because it was enacted that the licence of a house of that class might be taken away on grounds other than the four grounds mentioned in the Act of 1869, but in that case compensation was given to the persons interested in the licensed premises for the loss suffered through the premises being no longer available for the business of a beerhouse. The licence of this particular beerhouse was taken away in 1905, and compensation was awarded both to the plaintiff as the lessor and to the defendant as lessee of the premises. The compensation which the defendant received was for the loss which he would suffer in being unable to sell any more beer on the premises. The compensation money was paid in August, 1907, and it is contended on behalf of the defendant that from that date the lease was at an end. Now, there was by the lease, as I have said, a demise of a beerhouse, premises, and a bakehouse in the rear, and, although the defendant could no longer carry on the business of a beerhouse, he still, in my opinion, continued to be the lessee of the premises and of the bakehouse. Although the house had ceased to be a beerhouse, it still was a house. Suppose a chapel was licensed for the solemnization of marriages, it would none the less still be a chapel when the licence was withdrawn, and I cannot see that because these premises are no longer a licensed beerhouse that they have ceased to be a house. We have been referred to the case of *Taylor* v. *Caldwell* (1), where it was held that if there is an entire and absolute failure of consideration then there is an end of the contract. That principle was not only laid down in *Taylor* v. *Caldwell* (1), but also in *Gowan* v. *Christie* (2), where Lord Selborne said: "The principle of the argument was, that by the Roman law, adopted into the law of Scotland, there is a warranty implied or expressed (I do not know which it may be, but there is certainly a warranty in one way or the other) of possession of a subject capable of producing the contemplated fruits or profits. Now, in one point of view, such a doctrine may be, and I venture to say is, perfectly intelligible and perfectly reasonable. When there is that which

(1) 3 B. & S. 826. (2) (1873) L. R. 2 H. L. Sc. 273, at p. 275.

in the language of the law of this country would be called a total failure of consideration—when the landlord has not the thing to let which he purports to let, and which is the consideration for the rent, it is perfectly reasonable that the whole lease should fail ab initio and be subject to reduction. Nor is it a very wide extension of that principle to say that if a landlord warrants a continuation of the subject-matter for a certain number of years, a total failure of the subject-matter before that number of years has elapsed shall involve a reduction or termination of the contract at the time of that failure and thenceforward. Those views are perfectly intelligible. But they all resolve themselves into either the original non-existence or the subsequent exhaustion or failure of the subject-matter."

That principle has been applied in many other cases, of which *Baily* v. *De Crespigny* (1), *Krell* v. *Henry* (2), and the Scotch case of *Hart* v. *Arrol* (3) are examples. The question, therefore, which we have to ask ourselves in this case is, has there been a total failure of consideration, or, if there was an implied warranty by the lessor as to the continuance of the subject-matter of the demise, has there been a breach of that warranty? In my opinion the answer to this question is in the negative. The Licensing Act, 1904, did not simply put an end to this house as a beerhouse and do nothing more. The Act recognized that because the house had ceased to be a beerhouse, but nevertheless remained a house, it was right that compensation should be paid to the persons interested in the licensed premises, and the compensation was to be a sum equal to the difference between the value of the licensed premises and the value which those premises would bear if they were not licensed premises. Counsel for the defendant was driven to say that the taking away of the licence and the receipt of the compensation money ipso facto converted the tenant into a trespasser, or at most a tenant at will. I do not think he became either the one or the other. In my opinion the tenant remained liable under the lease for the rent, and both the landlord and the tenant were bound to observe their respective covenants in the lease

(1) L. R. 4 Q. B. 180. (2) [1903] 2 K. B. 740.
(3) 6 F. 36.

1909

GRIMSDICK v. SWEETMAN.

Darling J.

so far as the altered circumstances permit the observance of those covenants. Suppose the tenant had covenanted that he would not sell beer at less than a certain price. He would after the licence had been taken away under the Act of 1904 be absolved from the performance of that covenant. So here the defendant covenanted that he would not use or permit the user of the premises in any other manner than as a beerhouse; but now that it has become impossible for the tenant to use the premises as a beerhouse, he does not, in my opinion, commit a breach of that covenant by living and sleeping on the premises and selling no beer there. It seems to me, therefore, that the county court judge could not have decided the case as he did except by finding that there had been a total failure of consideration within the rule laid down by Lord Selborne in *Gowan* v. *Christie.* (1) For the reasons which I have given, the facts do not, in my opinion, bring the case within that rule, and this appeal must, therefore, be allowed.

JELF J. I am of the same opinion. The cases which have been cited, and common sense also, point to this, that a contract can only be said to have been put an end to if there has been a total failure of consideration. Assuming that this case is governed by the principles applicable to the ordinary case of a contract, I do not think that there has been a total failure of consideration. We are, however, not dealing with an ordinary contract, but with an estate created by a lease under seal, and in that case, although probably the same principle applies, it must be shewn before the lessee can escape the payment of rent that the lease has come to an end. The position in the present case is that the lessee has been prevented by operation of law from any longer carrying on the business of a beerhouse upon the demised premises, and owing to the same cause the lessor's reversion has become of less value to him than it would otherwise have been; but the Licensing Act, 1904, has provided that both the lessor and the lessee shall receive compensation for the losses which they have respectively suffered, and it has been judicially determined that

(1) L. R. 2 H. L. Sc. 273.

the lessor is to be compensated for the injury to his reversion, and the lessee is entitled to compensation on the basis of the difference between the value of the demised premises when licensed and their value after the licence has been taken away. Therefore, although on the face of it it may seem hard that a tenant should continue to be liable to pay the full rent for the remainder of the term in spite of the fact that his chief source of income from the premises has ceased, still it must be taken, I think, that he has received compensation for that hardship. But, apart from the question of compensation, a lessee remains liable for the payment of the rent reserved by the lease unless and until it is shewn that the lease has come to an end. There are, of course, various ways in which a lease may come to an end; it may be by operation of law, or by re-entry for breach of covenant, or by agreement between the parties. The present case does not fall within either of the first two classes. Then can it be said that the terms of this lease provide either expressly or by implication that in the circumstances which have happened this lease is to be at an end? I know no reason why the parties to a lease of premises licensed as a beerhouse should not expressly agree that, if it becomes impossible to continue to use the premises as a beerhouse, the lease shall terminate; but they have not said so in terms in this lease, and the only way in which such an agreement can be implied is by holding that, if the lease is not so construed as to have that effect, the necessary result is that the tenant continues liable to pay rent without deriving any benefit whatever from the lease. I do not think that that would be the necessary result of holding that in the circumstances that have happened this lease is not at an end, for it seems to me impossible to say that the defendant will derive no advantage from the lease. There is still a house in which he can live and a bakehouse which he can use. It is said that his right to live in the house and to use the bakehouse was only ancillary to the use of the premises as a beerhouse, but I do not think that any such meaning can be extracted from the terms of the lease, which, as I read it, was not a demise of a beerhouse and nothing else, but was a demise of a beerhouse, premises and a bakehouse. It would to my mind be a most extraordinary thing to say that

1909

GRIMSDICK v. SWEETMAN.

Jelf J.

because the licence has been taken away the tenant has no right to continue to live in the house. I am unable to accept the view that in the circumstances that have happened this lease has come to an end; in my opinion the judgment of the county court judge was wrong and this appeal must be allowed.

Appeal allowed.
Leave to appeal refused.

Solicitor for plaintiff: *C. P. Eaton Taylor, for H. A. Matthews, St. Helens, Isle of Wight.*

Solicitors for defendant: *Speechly, Mumford & Co., for Lamport, Bassitt & Hiscock, Newport, Isle of Wight.*

F. O. R.

1909

July 27.

THE KING *v.* RAWSON.

Criminal Law—Cruelty to Animals—Four Animals—Information charging One Offence—Four Convictions—Validity—Cruelty to Animals Act, 1849 (12 & 13 *Vict.* c. 92), *s.* 2.

An information under s. 2 of the Cruelty to Animals Act, 1849, charged the defendant for that he did cruelly ill-treat four ponies between certain dates by neglecting to supply them with nourishing food. The defendant was convicted by a Court of summary jurisdiction and fined 5*l.* in respect of each pony. Four convictions were drawn up, each of which stated that the defendant had been convicted of ill-treating "a pony" in the manner alleged in the information. The defendant had no notice before conviction that he was being charged with a separate offence in respect of each pony:—

Held, that the information alleged only one offence, and that the defendant could not, without previous notice, be convicted on that information of four offences; three of the convictions were bad and must be quashed.

RULE nisi to justices of the peace in and for the county of Suffolk to shew cause why a writ of certiorari should not issue to bring up four several records of conviction in order that the same might be quashed.

The defendant William Morley was summoned to appear before the justices to answer the sworn information of one Cecil Blake,

1909

REX v. RAWSON.

an inspector of the Royal Society for the Prevention of Cruelty to Animals, which stated that "William Morley of Bury St. Edmunds in the county of Suffolk, farmer, on divers dates between the 20th day of March and the 6th day of April, 1909, did unlawfully cause to be ill-treated four ponies at Great Barton in the said county by neglecting to supply the same with nourishing food" contrary to s. 2 of the Cruelty to Animals Act, 1849.

The defendant appeared in answer to the summons on April 28, 1909, and pleaded not guilty, and, after hearing evidence in support of the charge and for the defence, the justices convicted the defendant and fined him 5*l.* for each pony, making 20*l.* in all, and ordered the defendant to pay to the informant 4*l.* 1*s.* costs.

Four several records of the conviction were drawn up, one of which was in the following terms: "In the county of Suffolk Petty Sessional Division of Thingoe and Thedwastre. Before the Court of Summary Jurisdiction sitting at the Shire Hall, Bury St. Edmunds, the 28th day of April, 1909. William Morley of Bury St. Edmunds, in the said county, farmer (hereinafter called the defendant), is this day convicted for that he, on divers dates between the 20th day of March and the 6th day of April, 1909, at Great Barton within the county aforesaid did unlawfully cause to be ill-treated a certain animal to wit a pony by neglecting to supply the same with sufficient nourishing food contrary to the form of the statute in such case made and provided. And it is adjudged that the defendant do for his said offence forfeit and pay to the clerk of this Court at Bury St. Edmunds the sum of five pounds and do also pay to Cecil Blake the sum of four pounds and one shilling for costs forthwith."

The three other convictions were in the same terms as the above, except that they did not contain any order as to payment of costs.

In support of the motion for the rule nisi an affidavit by the defendant was filed in which he stated that when he appeared before the justices he was not charged four times with ill-treating a pony, nor was it intimated to him that he had to answer to more than one charge, or that it was proposed to hear several

1909

REX v. RAWSON.

charges against him together; that the chairman of the bench, in passing sentence, did not say that several cases had been proved against him, but that he was fined 5*l.* for each pony and the sum of 4*l.* 1*s.* for costs; that he was not informed, nor was it suggested in any way, that the fine and costs were in respect of more than one conviction; and that it was not until May 5, 1909, when certified copies of the convictions were supplied to his solicitor by the clerk to the justices, that he became aware that there were four convictions made in respect of the one information.

The rule nisi was granted upon the ground that the justices had no jurisdiction to inflict four penalties on four convictions on one information.

Stuart Bevan, for the informant, shewed cause against the rule. Where an information alleges cruelty to a number of animals the prosecution may proceed either by one summons for the collective offence or by a number of summonses for a separate offence in respect of each animal: *Rex* v. *Cable*. (1) If there had been four summonses in this case no question could have arisen as to the validity of the convictions; but "process is not essential to the jurisdiction of the justices to hear and adjudicate": *Reg.* v. *Hughes* (2), per Hawkins J.; *Dixon* v. *Wells* (3); and therefore, the defendant having appeared before the justices, they had jurisdiction to adjudicate upon the four offences charged in the information. The defendant alleges that he had no notice that he was being charged with four distinct offences, but it is not necessary that he should have formal notice if, as was the fact, the information clearly disclosed that cruelty to four ponies was alleged against him; this was made still more clear when the justices ordered the defendant to pay four fines. No objection was taken by the defendant or his solicitor, and the defect in procedure, if any, was cured: *Rex* v. *Wilkins*. (4) In any event, one of the convictions must be good, and should stand.

Rawlinson, K.C., and *F. K. North*, for the defendant, in support

(1) [1906] 1 K. B. 719.
(2) (1879) 4 Q. B. D. 614, at p. 625.
(3) (1890) 25 Q. B. D. 249.
(4) [1907] 2 K. B. 380.

of the rule. The informant is in a dilemma. The information either charged four offences or one offence. If it charged four offences, it is bad under s. 10 of the Summary Jurisdiction Act, 1848.

[LORD ALVERSTONE C.J. referred to *Rodgers* v. *Richards*. (1)]

If it charged one offence only, then the justices had no power to convict for four offences. There was, in fact, only one offence, as in *Rex* v. *Cable* (2), and the defendant has sworn, and it is not contradicted, that he was not told, and never knew till he obtained the records of the convictions, that he had been tried and convicted for four separate offences. One may surmise that the reason why four convictions were drawn up is that the clerk to the justices realized that a penalty of 20*l*. could not be imposed for one offence, the maximum penalty under the Act being 5*l*. All the convictions ought to be quashed, for it is impossible to connect any one of the four with any particular pony. Further, the amount of costs which the defendant was ordered to pay includes the costs of all four convictions.

[*Bevan*. If one conviction is upheld, I do not contend that the order for the full amount of costs can stand.]

LORD ALVERSTONE C.J. I desire to express no opinion as to what our decision would have been if before the defendant was convicted he had had notice that he was being charged with four separate offences; but it seems to me that that ought to have been brought to his notice before he was convicted, because it is impossible to say what his course of action at the trial would have been if he had known that he was charged with a separate act of cruelty in respect of each pony. The defendant in his uncontradicted affidavit has sworn that he did not know that he was being tried and convicted for four offences. That being so, the simple question is whether, where the summons and information charge one offence only—and in my opinion only one offence was charged in this information—the defendant can without notice of a charge of the other offences be convicted of four offences. In my opinion a defendant cannot be so convicted. I do not agree with the suggestion that because the information

(1) [1892] 1 Q. B. 555. (2) [1906] 1 K. B. 719.

1909

REX
v.
RAWSON.

Lord Alverstone C.J.

mentions four ponies that that was sufficient notice that four offences were being charged. In my opinion, therefore, there should in this case have been only one conviction, but it does not follow that all the four convictions are bad. The justices held on the evidence that it had been proved to their satisfaction that the defendant did ill-treat each of the four ponies. Each of the convictions refers to "a pony"; one of the convictions is, therefore, a good conviction, and none the less so because there are three other convictions which are bad. In our judgment the proper course is to make the rule absolute for a writ of certiorari to quash three of the convictions, including the one which ordered the payment of costs.

DARLING and A. T. LAWRENCE JJ. concurred.

Rule absolute accordingly.

Solicitor for informant: *S. G. Polhill.*

Solicitors for defendant: *Whitford & Thorp, for Greene & Greene, Bury St. Edmunds.*

F. O. R.

CHILD *v.* EDWARDS.

1909
July 6.

Landlord and Tenant—Distress for Rent—Rent due on Sunday—Legality of Distress levied on following Monday.

At common law Sunday is not a dies non.

Rent may lawfully be paid by a tenant on a Sunday. Therefore where it is due on that day, and is not paid, it will be in arrear on the following Monday, and the landlord may then lawfully levy a distress for it.

Action tried before Ridley J. without a jury.

The action was brought to recover damages for wrongful distress.

By an agreement in writing dated June 24, 1908, the defendant demised to the plaintiff a house in Camberwell for one year from June 24, 1908, at a yearly rent of 50*l.*, to be paid by equal monthly payments of 4*l.* 3*s.* 4*d.*, the first payment to be made on July 24, 1908. The plaintiff did not pay any rent on January 24, 1909, which was a Sunday, and on Monday, January 25, the defendant levied a distress for 4*l.* 3*s.* 4*d.*, a monthly instalment of rent. The case for the plaintiff was that no rent was in arrear on Monday, January 25, because it was not by law payable on a Sunday. It was therefore not due till Monday, January 25, and was not in arrear till Tuesday, January 26. The earliest day on which the distress could lawfully be made was therefore Tuesday, January 26. For the defence a member of the Certificated Bailiffs' Association was called to shew that it was a practice, frequently acted upon, to levy distresses on a Monday for rent falling due on a Sunday, and it was submitted that as the rent was due on Sunday, January 24, it was in arrear on Monday, January 25, and that the defendant was therefore lawfully entitled to levy the distress on that day.

G. H. B. Kenrick, for the plaintiff. At common law Sunday is a dies non and rent which would fall due on that day is not due until the following Monday. It follows that in the present case the rent was not due till Monday, January 25, 1909, and

1909

CHILD v. EDWARDS.

therefore was not in arrear till Tuesday, January 26. The earliest time at which a distress could lawfully be made was, therefore, after sunrise on the day the rent was in arrear, namely, January 26: Bullen on Distress, 2nd ed., p. 138. There is no direct authority upon the point, but in Woodfall on Landlord and Tenant, 18th ed., p. 458, note (*k*), it is submitted that "the general tendency is to regard Sunday as a dies non for all purposes."

That passage contains a correct statement of the law. The dictum of Mathew J. in *Werth* v. *London and Westminster Loan Co.* (1) is in the plaintiff's favour. The Sunday Observance Act, 1677 (29 Car. 2, c. 7), and the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), made applicable to bank holidays that which had been the previous practice at common law with regard to Sundays. [*Dibble* v. *Bowater* (2) was also referred to.]

H. S. Cautley, for the defendant. There is no illegality in a contract to pay a debt on Sunday. A debt which is by a contract payable on a certain day is due on that day unless payment on that day is made illegal by statute. Before the passing of the Sunday Observance Act, 1677, s. 6, the acts prohibited by that section could have been lawfully done on Sunday. The fact that that statute was necessary to make certain contracts illegal if entered into on Sunday shews that at common law the contracts would have been lawful. Sect. 14 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), is a further illustration of a statute being required to alter the time of payment where the payment would fall due on a Sunday. There is no authority for the proposition that Sunday is a dies non at common law. [Chitty's Statutes, 5th ed., vol. 12, title "Sunday Observance Act, 1677," s. 6, p. 6, note (*r*), and *Sangster* v. *Noy* (3) were also referred to.]

Kenrick, in reply. The Bills of Exchange Act, 1882, is merely declaratory of the custom of merchants which is part of the common law. No alteration in the common law rules with regard to Sunday was made by either of the statutes which have been cited.

(1) (1889) 5 Times L. R. 521. (2) (1853) 2 E. & B. 564.
(3) (1867) 16 L. T. 157.

1909

CHILD v. EDWARDS.

RIDLEY J. I have come to the conclusion that the note in Woodfall on Landlord and Tenant to which reference has been made cannot be relied upon. The matter is one upon which there is not much authority. On behalf of the plaintiff it was contended that where a person contracts to pay a debt or to perform a duty on a Sunday payment of the debt or performance of the duty is not at law due till the following day. No authority has been produced which supports that proposition. The power of enforcing performance of a contract or payment of a debt by civil process on the day that it becomes due, if that day is a Sunday, was taken away by s. 6 of the Sunday Observance Act, 1677, which prevents the service or execution of any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace. By virtue of that enactment a person liable to perform a contract or pay a debt was granted relief to this extent, that he cannot be compelled to do the act on that day. No civil process can be served upon him. But some acts remain of a legal character even though performed on that day, as appears from the decision in *Sangster* v. *Noy* (1), with which I am much inclined to agree, although it is not an authority which is binding upon me, as the case was not taken to the High Court. By the Rules of the Supreme Court, 1883, which were made by virtue of the authority conferred by s. 19 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), Sunday is specially dealt with. So by s. 14, sub-s. 1 (*a*), of the Bills of Exchange Act, 1882, it is provided that if the last day of grace falls upon a Sunday, payment of the bill is, with the exception mentioned in sub-s. 1 (*b*), to be made on the preceding business day. There are other similar cases of legislation with regard to Sunday, and it seems to follow that it required statutory authority in order to make Sunday a dies non for the purpose of serving process or for other purposes. I come to the conclusion that at common law Sunday was not a dies non. In Chitty's Statutes there is a note by the editor under s. 6 of the Sunday Observance Act, 1677, saying that "before this statute ministerial acts done on a Sunday were lawful." That could not be true if Sunday

(1) 16 L. T. 157.

1909

CHILD v. EDWARDS.

Ridley J.

were a dies non. In my opinion, as the rent for which the defendant distrained became due on the Sunday under the contract of June 24, 1908, and as there is no statute by which it is enacted that rent cannot be legally paid on that day, it was lawfully due on the Sunday, and as it was not paid on that day it became in arrear on the following Monday, and the distress was therefore lawfully made. (1)

Judgment for defendant.

Solicitor for plaintiff: *F. P. Woodcock.*
Solicitors for defendant: *Leggatts & Carruthers.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

1909
June 24.

THE KING *v.* SMITH.
THE KING *v.* WILSON.

Criminal Law—Penal Servitude—Remanet Sentence—Conviction on Indictment for New Offence—Order that Sentence for New Offence run concurrently with, or commence after expiration of, Remanet Sentence—Jurisdiction of Court—Penal Servitude Act, 1864 (27 & 28 *Vict. c.* 47), *s.* 9—*Penal Servitude Act*, 1891 (54 & 55 *Vict. c.* 69), *s.* 3, *sub-s.* 3.

Where the holder of a licence to be at large during a remanet (i.e. an unexpired portion of a sentence of penal servitude) is subsequently convicted of an indictable offence, the Court before which the subsequent conviction takes place has no power to order that the sentence which it inflicts shall commence after or run concurrently with the remanet which, upon conviction for the new offence, the convict becomes liable to serve under s. 9 of the Penal Servitude Act, 1864, inasmuch as that section provides that a term equal to the remanet shall be served after the convict has undergone the punishment for the subsequent offence. Therefore, in passing sentence for the subsequent offence, the Court should make no reference to the remanet.

THESE were two petitions presented to the Home Secretary by the prisoners Smith and Wilson respectively with reference to their sentences. The Home Secretary referred the petitions to the Court of Criminal Appeal under s. 19, clause (*a*), of the

(1) See also *Milch* v. *Frankau & Co.*, ante, p. 100.

Criminal Appeal Act, 1907, and thereupon, by virtue of that section coupled with r. 48 of the Criminal Appeal Rules, 1908, the petitioners were deemed to be appellants.

REX *v.* SMITH.

This petitioner was convicted on October 23, 1908, at the Carmarthen quarter sessions of breaking and entering the dwelling-house of Thomas Vivian Thomas on July 21, 1908, with intent to steal. He was sentenced to be kept in penal servitude for three years "to commence after the remanet of a previous sentence of penal servitude" (318 days). In November, 1908, he applied to the Court of Criminal Appeal for leave to appeal against his conviction on the ground that the method by which he was identified was unsatisfactory. That application was refused. He subsequently presented a petition to the Home Secretary with regard to his sentence. The petition alleged "that my sentence of three years' penal servitude is illegal upon the ground that the Court had no power to pass a sentence consecutive to my remanet."

REX *v.* WILSON.

This petitioner was convicted on April 2, 1909, at the Newcastle-on-Tyne quarter sessions of being found by night on March 8, 1909, in possession of housebreaking implements. He was sentenced to be kept in penal servitude for three years "to run concurrently with a period of 245 days, a remanet of a previous sentence of three years' penal servitude." He did not appeal, but petitioned the Home Secretary with regard to his sentence. The petition alleged "that my sentence of three years' penal servitude is illegal upon the ground that the Court had no power to pass a sentence concurrent with my remanet."

R. E. L. Vaughan Williams, for the appellants. The sentences are illegal and the convictions are therefore bad.

As to Smith, the Court before which he was tried had no power to order that his sentence of three years' penal servitude should commence after the expiration of his remanet. The sentence is directly in conflict with the words of s. 9 of

1909

REX v. SMITH. REX v. WILSON.

the Penal Servitude Act, 1864 (1), by which it is enacted that the remanet shall be served after the expiration of his sentence for the new offence. A sentence cannot be severed in order to uphold one part of it which, taken alone, might be good. Therefore the words "to commence after the remanet of a previous sentence of penal servitude" cannot be rejected,

(1) Penal Servitude Act, 1864 (27 & 28 Vict. c. 47), s. 9, as amended by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), s. 3, sub-s. 3: "Where any licence granted in the form set forth in the said schedule (A) is forfeited by a conviction on indictment of any offence, or is revoked in pursuance of a summary conviction under this Act, or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted . . . ."

The licence in Sched. A is a licence to the convict to be at large during the unexpired portion of his term of penal servitude, but the licence is forfeited if he is before the expiration of the term convicted on indictment of an offence, and is liable to be revoked on the breach of any of the conditions indorsed on the licence.

Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 3: "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal . . . . (*c*) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."

Sect. 4, sub-s. 3: "On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence, warranted in law . . . . in substitution therefor as they think ought to have been passed, ..."

Sect. 19: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State, on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may if he thinks fit, at any time either—

"(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or, ..."

Criminal Appeal Rules, 1908, r. 48: "When the Secretary of State exercises his powers under section 19 (*a*) of the Act and refers the whole case to the Court of Appeal, the petitioner whose case is so dealt with shall be deemed to be for all the purposes of the Act or these Rules a person who has obtained from the Court of Appeal leave to appeal, and the Court of Appeal may proceed to deal with his case accordingly."

and the whole sentence is bad. It is true that in *Rex* v. *Hamilton* (1) this Court struck out the words "to run concurrently," but the proper course would have been to quash the conviction. This is not an appeal against a sentence within the meaning of s. 4, sub-s. 3, of the Criminal Appeal Act, 1907. The appeal there referred to is an appeal under s. 3 (*c*) of the Act of 1907, i.e., merely against the amount of a sentence, and not as to the validity of a conviction. In the present case, the sentence being illegal, the conviction is bad. The effect of s. 19, clause (*a*), of the Act of 1907 is that the whole case is now before the Court for hearing and determination. The scope of the section ought not to be cut down. As there was no authority to pass the sentence, the conviction is illegal, and the proper course is to quash it: *Reg.* v. *Surrey Justices* (2); *Rex* v. *Vipont* (3); *Rex* v. *Hawks* (4); Paley on Convictions, 2nd ed., vol. 1, p. 210. [Rule 48 of the Criminal Appeal Rules, 1908, was also referred to.]

As to Wilson's sentence, the same objections in law apply, and his conviction is therefore bad. There is the additional objection in his case that if the words in his sentence "to run concurrently with," &c., are treated as surplusage, the effect will be that he will have to serve a longer term than the Court intended to impose, as under s. 9 of the Penal Servitude Act, 1864, he will have to serve the remanet of 245 days after the expiration of his fresh sentence of three years' penal servitude.

R. D. Muir, for the prosecution. Smith's sentence of three years' penal servitude is good in itself, but the additional words postponing its operation until the expiration of the remanet have no operation, as they are contrary to s. 9 of the Penal Servitude Act, 1864. They ought therefore to be treated as surplusage.

For the same reason the words ordering Wilson's sentence of three years' penal servitude to "run concurrently with" the 245 days ought to be treated as surplusage. The Home Secretary has the power to exercise the clemency of the Crown with respect to the remanet of 245 days which the prisoner would by the effect of s. 9 of the Penal Servitude Act, 1864, otherwise have to serve,

(1) (1908) 1 Cr. App. R. 87.
(2) [1892] 2 Q. B. 719.
(3) (1761) 2 Burr. 1163.
(4) (1729) Str. 858.

1909

REX v. SMITH.

REX v. WILSON.

but which the Court before which he was tried did not intend to impose.

The judgment of the COURT (Lord Alverstone C.J., Darling and A. T. Lawrence JJ.) was delivered by

LORD ALVERSTONE C.J. In this case we have no doubt as to what our decision ought to be. We hope that the judgment I am about to give may be some guidance with regard to the form in which sentence ought to be passed for an offence where there is a remanet in respect of a previous offence. We should be sorry to be compelled to hold that a portion of a sentence inflicted by a Court of Justice ought to be treated as surplusage. With regard to the position in which these petitions stand, Smith applied to this Court for leave to appeal against his conviction. That application was refused. He then presented to the Home Secretary the petition with regard to his sentence. The ground upon which his petition was based was that his sentence of three years' penal servitude was illegal inasmuch as the Court before which he was tried had no power to pass a sentence to run consecutively to his remanet. That petition has been referred to us by the Home Secretary under s. 19, clause (*a*), of the Criminal Appeal Act, 1907. Wilson also petitioned the Home Secretary with regard to his sentence. In his petition he submitted that his sentence of three years' penal servitude was illegal upon the ground that the Court before which he was tried had no power to pass a sentence to run concurrently with his remanet. His petition was also referred to us by the Home Secretary. Sect. 3, clause (*b*), of the Criminal Appeal Act, 1907, allows an appeal with the leave of this Court against a conviction on a question of fact or of mixed law and fact, and clause (*c*) allows an appeal with the leave of this Court against a sentence passed on conviction. Sect. 19, clause (*a*), enables the Home Secretary to refer a petition with regard to sentence to this Court, which is thereupon to hear and determine the case as if it were an appeal by the person convicted; and by r. 48 of the Criminal Appeal Rules, 1908, the petitioner is to be deemed to be a person who has obtained from this Court leave to appeal. It follows that when the petitions against the sentences were

1909

REX v. SMITH. REX v. WILSON.

referred to us by the Home Secretary, each petitioner became an appellant against his sentence only under s. 3, clause (*c*), of the Act, and we have power under s. 4, sub-s. 3, to quash the sentences and pass such others warranted in law as we think ought to have been passed.

The effect of s. 9 of the Penal Servitude Act, 1864, as amended by s. 3, sub-s. 3, of the Penal Servitude Act, 1891, is that the proper sentence to pass in each case was a term of penal servitude or imprisonment, without any reference to the remanet sentence, because s. 9 of the Penal Servitude Act, 1864, expressly enacts that the remanet sentence is to be served after the prisoner has undergone the punishment for the new offence. The Court that passes sentence for the new offence has nothing to do with the remanet. It ought to pass a single sentence for the new offence only, and the duty of the Court is not affected by the fact that such words as "to take effect after the previous sentence" or "to run concurrently with" might be regarded as surplusage as in *Rex* v. *Hamilton*. (1) There the prisoner had been sentenced to three years' penal servitude to run concurrently with 265 days of an unexpired sentence of penal servitude, and this Court struck out the words "concurrent with the unexpired term of 265 days," leaving the Home Secretary to deal as he thought fit with the 265 days. In our judgment the only sentence that can be given by any Court is a sentence for the offence for which the prisoner is convicted before it. The total punishment to which the prisoner becomes liable is not the result of that sentence, but of the enactment contained in s. 9 of the Penal Servitude Act, 1864, as amended by s. 3, sub-s. 3, of the Penal Servitude Act, 1891. In the present cases it becomes our duty to pass the sentences that ought to have been passed by the Courts before which the petitioners were respectively tried. Smith was sentenced to three years' penal servitude, to commence after his remanet, that is, to three years and 318 days. We now pass upon him a sentence of three years' penal servitude to commence from the date of his conviction. We have nothing to do with the effect that that sentence has upon his remanet. As to Wilson, who was sentenced to three years' penal servitude to

(1) (1908) 1 Cr. App. R. 87.

1909

REX v. SMITH. REX v. WILSON.

run concurrently with his remanet of 245 days, if we struck out the words "to run concurrently with," &c., it would result in his sentence being one of three years and 245 days, which would be more than the Court before which he was tried intended him to receive. It seems to me that that Court intended to inflict a sentence of penal servitude upon him of three years in length and considered that that would be a sufficient term. We substitute a sentence of eighteen months' hard labour, to commence from the date of his conviction, without any reference to his remanet of 245 days. The effect will be that under s. 9 of the Penal Servitude Act, 1864, he may have to serve the 245 days of his remanet after the expiration of his eighteen months' hard labour.

Sentences varied.

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution: *Director of Public Prosecutions.*

J. E. A.

1909

May 4, 5; *July* 5.

CHING *v.* SURREY COUNTY COUNCIL.

Negligence—Corporation—County Council—Liability for Negligence—Obligation to maintain School Premises—Injury to Pupil caused by Defect in Asphalte of Playground—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75)—*Board of Education Act*, 1899 (62 & 63 *Vict. c.* 33)—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42).

The plaintiff, a pupil at a public elementary school provided by the defendants, the Surrey County Council, as the local education authority, caught his foot, while playing in the playground attached to the school, in a hole existing in the asphalte of the playground, and fell and was seriously hurt. He brought an action by his next friend against the defendants to recover damages for the injuries so sustained by him. The jury found that his injuries were caused by the negligence of the defendants:—

Held, that the action lay, inasmuch as the joint effect of s. 14 and that portion of s. 18 of the Elementary Education Act, 1870, which is unrepealed by the Education Act, 1902, coupled with ss. 5 and 7 of the Act of 1902, is to cast upon the defendants the duty of keeping the playground in proper repair for the use of pupils attending the school, and

in the performance of that duty the defendants were not acting in a ministerial capacity only.

Tozeland v. *West Ham Union*, [1907] 1 K. B. 920, distinguished.

FURTHER CONSIDERATION.

The action was brought by the plaintiff, a lad about nine years old (who sued by his father as his next friend), against the defendants, the Surrey County Council, for damages resulting from personal injuries sustained through the alleged negligence of the defendants, who were the local education authority for the county.

The plaintiff was at the time when he was injured a scholar in the elementary school at Maybury, in the district of Woking, provided by the defendants.

On July 9, 1908, he was in the school playground at the 11 o'clock interval for play, and whilst he was being chased by another schoolboy he fell, through his foot being caught in a hole in the asphalte floor of the playground, and a bone of his left arm was broken.

The alleged negligence was that the defendants in breach of their duty negligently kept the playground floor, which it was contended they were bound to keep in repair, in an unsafe condition.

In the statement of claim it was alleged that the defendants were liable to maintain and keep efficient the school and premises and to preserve the same in a condition safe for the use of the pupils attending the school.

The defendants by their defence, whilst denying that the floor of the playground was out of repair, pleaded that, if it was, and if they were liable to maintain and keep efficient the school, their liability was part of the administrative duties imposed on them by the Education Acts, 1870 to 1907, and that they appointed proper managers and officers to carry out their administrative duties, and were not liable in damages for injuries occasioned to any pupil attending a school provided by them in pursuance of their statutory duty by the negligence, if any (which was denied), of their managers or officers.

Evidence was given at the trial (which took place before Bucknill J. and a common jury at the Guildford Assizes on

1909

CHING v. SURREY COUNTY COUNCIL.

March 5, 1909) that the floor of the playing shed where the plaintiff fell was paved with tar paving, and that on the day of the accident there were two or three holes in it, one of which was near a vaulting horse which was used for gymnastics, and in which the plaintiff's foot caught. The plaintiff's foot caught in this hole, and he was thereby thrown down whilst he and another scholar were being chased by two older boys from the vaulting horse, on which they had been playing.

The hole had been known to the plaintiff to have been there for about six months, but on this occasion he had not noticed it when trying to escape from his pursuer.

No contributory negligence was charged against the plaintiff.

There was evidence that this hole was three to four inches deep and as large as a boy's cap in circumference.

The caretaker of the school-house, who was one of the defendants' witnesses, admitted that there were two holes in the floor of the playing shed, which had been there some three or four weeks before the accident, and which he had been in the habit of filling up daily with fine gravel to level them with the floor. Those holes he did not report to the managers or the head school teacher because he did not consider them dangerous.

There was considerable difference of opinion expressed by the witnesses at the trial as to the exact position of these holes and their size and depth.

The head teacher at the school, one of the defendants' witnesses, said that he had known of these holes four or five weeks before the accident, and that they were getting worse. He had told the plaintiff's mother after the accident that they would be repaired in the August holidays. He made no report about the holes because he did not think they were dangerous so long as the caretaker filled them in as he described.

On the day of the accident, but after it happened, the clerk of works to the Surrey education committee, another of the defendants' witnesses, inspected the playing shed and saw two holes in the floor. He reported the matter on his return to Kingston, and repairs were done to the floor during the summer holidays.

He admitted in cross-examination that it was his duty

to inspect provided school premises from time to time and to report directly to the defendants, or to the education committee of the defendants, what was requisite to be done by way of repairs, and that all repairs to the asphalte floors of playgrounds of such schools were invariably carried out by the education committee of the defendants and not by the school managers, and were paid for by the defendants.

A circular dated July 7, 1903, of the Surrey education committee was put in by the defendants, addressed to the clerks of provided or council schools, to the effect that managers might incur expenditure up to 10*l.* per annum for small or urgent repairs of each separate school building without reference beforehand to the Surrey education committee.

The opportunity of considering the question whether these holes came under the head of small or urgent repairs never arose, because their existence was not reported to the clerk of this school before the accident.

The education committee of the Surrey County Council issued from time to time a handbook for managers of provided and non-provided schools, which was put in evidence at the trial by consent as a book of directions.

At page 9 of the managers' handbook it stated that "managers of provided schools act in all matters of management as agents for and on behalf of the committee."

At page 16 thereof it was stated that it is the duty of managers to note the condition of the school buildings, playgrounds, and offices, and to report any defects or want of repair to the next managers' meeting.

At page 128 it was stated that the liability to repair the school buildings of provided schools rests with the education committee representing the county council.

At page 166 it was stated that the school caretaker (appointed by the managers) was to report promptly to the school clerk all damage to the school buildings, and that the head teacher (paid by the defendants) would be held responsible that the caretaker carried out his duties efficiently.

In 1903 a scheme was made by the defendants and approved by the Board of Education under s. 17, sub-s. 1, of the Education

1909

CHING v. SURREY COUNTY COUNCIL.

Act, 1902. It provided for the constitution of an education committee. In the same year the defendants as the local education authority, by the education committee as their agents, delegated to the managers of provided schools in their respective districts certain matters, such as the selection of head teachers for appointment by the committee, the appointment and dismissal of assistant teachers subject to the approval and sanction of the committee, and the appointment of caretakers.

At the trial it was agreed that the only question to be decided by the jury was one of fact, leaving it to the judge to decide on further consideration, in the event of the jury deciding against the defendants, whether on the finding of the jury the plaintiff was entitled to judgment.

The jury found that the plaintiff was injured in consequence of the negligence of the defendants and assessed the damages at 83*l.* 19*s.* 6*d.*

On May 4 and 5 the case was argued before Bucknill J. on further consideration in London, it being contended on behalf of the defendants that there was no evidence of negligence causing the accident, and that even if there was, no action would lie against the defendants in respect of that negligence.

Avory, K.C., and *Guy Lushington*, for the defendants. The defendants are entitled to judgment. There was no evidence of negligence which caused the accident, but, assuming that there was evidence which justified the jury in finding that there was negligence on the part of the defendants which caused the accident, the action will not in law lie against them.

Sect. 6 of the Education Act, 1902, shews that the body of managers required by that section to be appointed are an independent statutory body. In the present case two of the managers were not appointed by the defendants. Under clause 4 of head B of the First Schedule to the Act of 1902 the managers of a school provided by the local education authority "shall deal with such matters relating to the management of the school, and subject to such conditions and restrictions, as the local education authority determine." The managers were expressly authorized by the circular of July 7, 1903, to pay for the class of repair

which is in question in the present case. The caretaker was appointed by the managers, and it is clear upon the evidence that the negligence, if any, was that of the caretaker, for which the managers are responsible. The only ground upon which the Court could hold that the defendants are liable for injuries caused by defects of this kind in the school premises would be that they owe a duty to each child attending the school to see that the premises are kept in perfect repair. It would be physically impossible for the defendants to do this, and they had no duty to each individual pupil.

Further, the defendants are merely performing statutory ministerial duties with regard to the pupils, although they may be in a different position as regards third persons. They are in exactly the same position in law as poor law guardians, who were held in *Tozeland* v. *West Ham Union* (1) not to be liable to an action at the suit of a pauper for the negligence of their officers. The defendants perform their duties subject to the control of the Board of Education. The analogy between the position of the defendants and that of guardians of the poor is complete. Under the Elementary Education Act, 1870, all the duties of school boards were performed subject to the superintendence and control of the Education Department, and by the Board of Education Act, 1899 (62 & 63 Vict. c. 33), the Board of Education established by that statute took the place of the Education Department. Sect. 16 of the Education Act, 1902, enables the Board of Education to take steps to ensure that any order made by them for the purpose of compelling a local education authority to fulfil their duty may be enforced by mandamus. The Board of Education therefore controls every local education authority.

In s. 7 of the Education Act, 1902, which provides that "the local education authority shall maintain and keep efficient al elementary schools," the word "maintain" is used in a metaphysical, not in a physical, sense. It means that the local education authority is to maintain the religious education of the school: *Attorney-General* v. *West Riding of Yorkshire County Council.* (2) Throughout the Education Act, 1902, the word "school" is used in contradistinction to "school house" or

(1) [1907] 1 K. B. 920. (2) [1907] A. C. 29.

1909

CHING v. SURREY COUNTY COUNCIL.

"school premises." It means the system of education. [*Tobin* v. *Reg.* (1), Beven on Negligence, 3rd ed., vol. 1, p. 242, and the Education Act, 1902, s. 23, were also referred to.]

H. St. Gerrans and *Nolan*, for the plaintiff. There was ample evidence of negligence.

As to the liability in law of the defendants, it is no part of the duties of the managers to see that the school buildings are in repair, and they are not liable for the injuries caused to the plaintiff by the defect in the floor of the playground. The headmaster and caretaker are servants and agents of the defendants. There is a complete cause of action against the defendants, who not only invite the pupils on to the school premises, but compel them to go there. The word "maintain" in s. 7 of the Education Act, 1902, means to physically keep the structure of the schools in repair. The effect of the section is that every local education authority has the duty of maintaining and keeping efficient a system of education. This involves the walls, roofs, and floors of the school premises being maintained in a fit condition to carry on the system. The only qualification to this liability is contained in sub-s. 1 (*d*) of s. 7, which in the case of non-provided schools casts upon the managers the liability to keep the schoolhouse in good repair.

Under the Education Act, 1902, the local education authority exercises original jurisdiction subject to the provisions contained in s. 16 of the Act. That is the only section in the Act of 1902 pointing to any control by the Board of Education over the defendants. It is expressly provided by the section that before the local education authority can be compelled to perform their duty, or to provide any additional school accommodation which in the opinion of the Board of Education is necessary, the Board must hold a public inquiry, so that the control of the Board of Education is of a limited nature. *Tozeland* v. *West Ham Union* (2) has no application. There is no analogy between the position of guardians of the poor and that of the local education authority. The guardians do not exercise any original jurisdiction. They merely carry out the instructions of the Local Government Board. The words of s. 15 of the Poor Law

(1) (1864) 16 C. B. (N.S.) 310. (2) [1907] 1 K. B. 920.

Amendment Act, 1834 (4 & 5 Will. 4, c. 76), are imperative, and it is correctly stated in Archbold's Poor Law, 15th ed., p. 101, that the only act which guardians can do without the consent or being subject to the control of the Local Government Board is refusing relief in any individual case, that Board being prohibited from interfering in an individual case for the purpose of ordering relief. Under the Education Act, 1902, the discretion of the local education authority is not in any way fettered. *Cormack* v. *Wick School Board* (1) is in the plaintiff's favour. [*Mersey Docks Trustees* v. *Gibbs* (2), *Coe* v. *Wise* (3), and s. 9 of the Education Act, 1902, were also referred to.]

Avory, K.C., in reply. The decision in *Mersey Docks Trustees* v. *Gibbs* (2) does not apply. In *Tozeland* v. *West Ham Union* (4) Sir Gorell Barnes referred to and distinguished it in his judgment on the ground that it was the case of a claim made by an "outside claimant," i.e., by a person "who is not in a relationship of any sort" to the other party to the action. *Cormack* v. *Wick School Board* (1) turned upon the question of whether there was negligence and contributory negligence. There is no reference to statutory liability in the judgments. In the present case there was nothing in the nature of a trap, for the plaintiff admitted he knew of the existence of the hole. [The Elementary Education Act, 1870, ss. 16, 18, and 97, the Education Act, 1902, s. 17, sub-ss. 1, 2, and 7, *Gibson* v. *Young* (5), and the Code of Regulations for Public Elementary Schools in England (1908) were also referred to.]

Cur. adv. vult.

July 5. The following judgment was read by

BUCKNILL J., who, after stating the facts and holding that on the evidence the jury were justified in coming to the conclusion that the plaintiff caught his foot in one of the holes and fell, that it was a dangerous place, and that his injuries were caused by the negligence of the defendants, continued :—

The next question is whether the defendants are liable in law

(1) (1889) 16 R. 812.
(2) (1866) L. R. 1 H. L. 93.
(3) (1864) 5 B. & S. 440.
(4) [1907] 1 K. B. 920.
(5) (1900) 21 N. S. W. L. R. 7.

1909

CHING v. SURREY COUNTY COUNCIL.

Bucknill J.

for their negligence which caused the injuries to the plaintiff. To answer this question it is necessary to shortly refer to the Elementary Education Act, 1870, and the Education Act, 1902. By the Elementary Education Act, 1870, school boards, which were then created, had the power and duty of providing sufficient school accommodation in their respective districts, and they had also large powers of deciding such matters of business in relation to public elementary education as did not involve the consent of the Education Department.

By s. 14 of that Act (which is unrepealed) it was enacted that every provided school should be conducted under the control and management of the school boards in accordance with certain statutory regulations, and by s. 15 (repealed by the Education Act, 1902) school boards were empowered to delegate the control and management of provided schools to managers appointed by them with power of removal.

By the opening words of s. 18 (which are not repealed by the Act of 1902) the school boards were bound to maintain and keep efficient every provided school.

By s. 19 (repealed by the Education Act, 1902, to the extent hereinafter mentioned) every school board might, "whether in obedience to any requisition or not," provide school-houses, which included playgrounds, if any, properly fitted up. The words "whether in obedience to any requisition or not" were repealed by the Education Act, 1902.

By s. 30 (repealed by the Education Act, 1902) the school boards were made a body corporate and were empowered to apply any money in their hands to indemnify themselves against any law costs or damages they might incur in or in consequence of the execution of the powers granted to them.

I have cited enough of the Act of 1870 to shew that the powers and duties of a school board were not merely ministerial, and that they might be sued and found liable in damages in certain cases.

By the Board of Education Act, 1899, the Board of Education was established, charged with the superintendence of matters relating to education in England and Wales. That Board took the place of the Education Department, which was abolished.

1909

CHING v. SURREY COUNTY COUNCIL.

Bucknill J.

Subsequently the Education Act, 1902, was passed (it is not necessary to refer to intervening statutes), by which (s. 1) the council of every county became the local education authority, having throughout their area (s. 5) the "powers and duties" of a school board under the Elementary Education Acts, 1870 to 1900, as to school board schools, and having the responsibility for and the control of all secular instruction in public elementary schools *not* provided by them, i.e., in voluntary schools.

By s. 24, sub-s. 3, the word "duties" included (by reference to the Local Government Act, 1888) "responsibilities and obligations."

By s. 6 "All public elementary schools provided by the local education authority shall, where the local education authority are the council of a county, have a body of managers," of whom a number not exceeding four shall be appointed by the council, and the others, not exceeding two, by a minor authority—in this case the urban district council.

By s. 7 the local education authority shall maintain and keep efficient all necessary public elementary *schools* within their area, but in the case of non-provided schools only so long as certain conditions and provisions are complied with, and amongst others is the obligation on the managers thereof to keep the school-*house* provided by them in good repair.

By s. 3 of the Elementary Education Act, 1870, which is unrepealed, "school-house" is defined to include "the play-ground belonging to . . . . a school."

By s. 17 of the Education Act, 1902, the local education authority (in the present case the Surrey County Council) shall establish an education committee constituted in accordance with a scheme made by the council and approved by the Board of Education, and to that committee all matters relating to the exercise by the council of their powers under the Act shall stand referred, except the powers of raising a rate or borrowing money.

Under that section a scheme was made by the Surrey County Council and was approved by the Board of Education in 1903. It provided for the constitution of the education committee. In 1903 the defendants as the local education authority, by

1909

CHING v. SURREY COUNTY COUNCIL.

Bucknill J.

the education committee as their agents, delegated to the managers of provided schools in their respective districts certain matters, such as the selection of head teachers for appointment by the committee, the appointment and dismissal of assistant teachers subject to the approval and sanction of the committee, and the appointment of caretakers.

Thus the managers of provided schools are in my opinion the agents of the education committee in such matters as have been delegated to them by the committee, and the committee in its turn is the representative of the county council in all matters referred to it.

It is clear from the sections to which I have referred that the joint effect of s. 14 and the unrepealed part of s. 18 of the Elementary Education Act, 1870, and of ss. 5 and 7 of the Education Act, 1902, is that the defendants have the duty and the obligation cast on them to control, manage, maintain, and keep efficient all provided public elementary schools within the area of their jurisdiction. I say provided schools because the school at which the plaintiff was injured was a provided school, and it is therefore unnecessary to refer to other schools.

In my opinion these words are wide enough to include the obligation to keep playgrounds of provided schools in proper repair for the use of scholars who attend them and who have to use them at certain times, whether for duty or recreation.

It was argued on behalf of the defendants that the word "maintain" as used in s. 18 of the Elementary Education Act, 1870, and in s. 7 of the Education Act, 1902, was only applicable in what counsel called a metaphysical sense and could not be held to have any application to the repairs of a school. I disagree. The word is of common use in leases where a tenant covenants to maintain and repair the demised premises.

It was further contended on behalf of the defendants that if there is such an obligation a breach of it gives no cause of action for damages in the circumstances of this case.

The first ground upon which that contention was based was that if the negligence causing the injuries to the plaintiff was the negligence of the managers, they are an independent statutory authority created by s. 6 of the Education Act, 1902,

and they are not all appointed by the defendants, but only in the proportion (where the maximum number are appointed) of two to one; also that by the First Schedule, head B, clause 4, of the Act, the managers "shall deal with such matters, relating to the management of the school . . . . as the local education authority determine," and that the defendants did determine that managers should be empowered to carry out without special reference to the committee the ordinary small or urgent repairs of their school buildings, provided that they did not expend on any separate school building more than 10*l.* in one year, which sum had not in fact been spent on this school building in the year 1908 up to the time of the matters complained of.

In my opinion a sufficient answer is that it was proved at the trial that the managers never did repair the playground, as it was always done by the Surrey County Council; but even if it had been otherwise, I am of opinion that a failure by the managers to repair would not have absolved the defendants from liability. Managers of provided schools are by the words of the First Schedule, head B, clause 4, of the Act, "*provided* by the local education authority," and although they are not all *appointed* by them, they are, when appointed, their agents to carry out those duties which are delegated to them. And this appears to have been the view of the defendants themselves, for at page 9 of the managers' handbook it is stated that "managers of provided schools act in all matters of management as agents for and on behalf of the committee."

It was then argued that if there was negligence causing the injuries to the plaintiff, it was the negligence of the caretaker in the first instance.

The answer to that is that the caretaker was the servant in fact of the defendants, who paid him although he was appointed by the managers.

It was also contended that even if the caretaker was the servant of the defendants, yet no action would lie against them, and *Tozeland* v. *West Ham Union* (1) was cited. That was an action by a pauper who whilst in the defendants' workhouse as an inmate had been ordered by the labour master to assist a

(1) [1907] 1 K. B. 920.

1909

CHING v. SURREY COUNTY COUNCIL.

Bucknill J.

permanent official of the workhouse in the installation of electric light in the infirmary, and who whilst so working was injured by the negligence of that official. It was held by the Court of Appeal that the plaintiff had no right of action because the labour master in setting the plaintiff to work was performing administrative duties *imposed* on the guardians of the poor by statute, who were bound to set work for the inmate paupers, who in their turn were under statutory compulsion to do that work. As Farwell L.J. said (1), "The acts done by the guardians are all ministerial acts in performance of statutory duties to maintain and employ the paupers, for the due performance of which they are answerable to the Local Government Board"; or, in the language of Buckley L.J. (2), "The guardians . . . . are subordinate to the Local Government Board. They are a subordinate administrative body," who in doing by their agent the matters complained of in the action are merely acting ministerially, and cannot therefore be sued for damages arising from their negligence in that behalf.

I can see no analogy between that case and the present.

There, all rules, orders, and regulations for the management of the poor and for the guidance and control of all guardians of the poor are made and issued by the Local Government Board, and the guardians acting in that respect are bound to obey and carry out such orders and regulations, and are therefore acting ministerially and not otherwise.

The Board of Education, as I have already shewn, are charged only with the superintendence of matters relating to education in England and Wales. School boards had and in their place county councils have extensive powers with respect to public elementary education, and are not in the exercise of them acting ministerially only, and in my opinion they can be sued either for breach of contract or for damages resulting from negligence in the performance of those duties which, as in this case, I find they were bound to perform.

On the facts of this case, had they happened before the Education Act, 1902, came into force, the school board of the district would, in my opinion, have been liable.

(1) [1907] 1 K. B. 920, at p. 933. (2) [1907] 1 K. B. at p. 936.

1909

CHING v. SURREY COUNTY COUNCIL.

Bucknill J.

By the Education Act, 1902, school boards and school attendance committees were abolished, and by the Second Schedule, clause 1, of that Act the property, powers, rights, and liabilities of any school board existing at the appointed day were transferred to the council exercising the powers of the school board.

I am further of opinion that the language of s. 7 of the Education Act, 1902, is large enough to impose upon the defendants a liability to maintain and keep efficient the playgrounds of a provided school and to keep them in good repair and safe for the use thereof by the scholars when rightfully there. As a fact the defendants have regularly repaired these playgrounds, when necessary, and the managers have not done the repairs, but even if the managers had been in the habit of doing them it would have been as agents for the defendants, whose liability for their negligence would have remained.

The Scotch case of *Cormack* v. *Wick School Board* (1) was cited by counsel for the plaintiff, in which it was held that a school board was bound to keep a gate, part of the school premises and which they knew was used by children going to the school, in repair, and that they were liable to damages for negligently failing to keep it in a safe condition. By the Education (Scotland) Act, 1872 (35 & 36 Vict. c. 62), s. 36, on which the decision was based, it was provided that "the school board of every parish and burgh shall maintain and keep efficient every school under their management."

The result is that my judgment must be in favour of the plaintiff for 83*l.* 19*s.* 6*d.*, the amount awarded by the jury as damages, and costs.

Judgment for plaintiff.

Solicitor for plaintiff: *J. W. Barton.*

Solicitors for defendants: *Wyatt & Co.*

(1) 16 R. 812.

J. E. A.

C. A.
1909
July 15.

[IN THE COURT OF APPEAL.]

LAMBERT *v.* GREAT EASTERN RAILWAY COMPANY.

False Imprisonment — Railway Company — Special Constable — Arrest on Suspicion of Felony—Liability of Company.

A special constable of a railway company is the servant of the company, and if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion, an action for false imprisonment will lie against the company.

Application for judgment or new trial.

The action was brought by H. T. Lambert, a boy of seventeen, by his father as his next friend, against the Great Eastern Railway Company for damages for malicious prosecution and false imprisonment.

The plaintiff's father was a newsvendor carrying on business at Romford, and the plaintiff assisted him in his business by collecting the newspapers on their arrival at the station by the early train and distributing them.

Amongst the papers sold by the father was the *Essex Times*, which was published every Wednesday and Saturday at Stratford by Messrs. Wilson & Whitworth. It was the practice of the publishers to send a bundle of the *Essex Times* newspapers on the day of publication by the first train to Romford, where they had an office, addressed "Wilson & Whitworth, Romford." In consequence of complaints made by Messrs. Wilson & Whitworth that a large number of copies of the *Essex Times* had been from time to time abstracted from their bundles on their arrival at Romford station, the railway company referred the matter to their police department, and two of the special constables of the railway were instructed to watch the station.

On March 25, 1908, these constables saw the plaintiff abstract fifteen copies of the *Essex Times* from Messrs. Wilson & Whitworth's bundle on its arrival at Romford station, and thereupon they arrested him and took him into custody on the charge of stealing fifteen newspapers, the goods of the railway company.

The plaintiff stated that he had no intention of stealing the papers and gave as his reason for taking them that the manager of the Romford office had agreed to let his father have the *Essex Times* direct from the Stratford office, and that as his father's parcel was not at the station he took the number of papers he required for his round, namely fifteen, from Messrs. Wilson & Whitworth's bundle. He had no time to get the papers from the *Essex Times* office at Romford, as after completing his round he had to go home to breakfast and catch the 9.5 A.M. train to Brentwood, where he went to school.

The charge was heard by the Romford magistrates on April 2 and was dismissed without hearing the evidence for the defence.

The plaintiff thereupon brought this action.

The defendant company by their defence alleged that the constables were acting not as servants of the company, but as servants of the King; alternatively that as to the claim for malicious prosecution the company did not act without reasonable and probable cause, and that as to the claim for false imprisonment they had reasonable grounds for suspecting that the plaintiff had been guilty of felony; and they paid four guineas into Court with a denial of liability.

Each of the two constables in question was, upon the application of the company, appointed a special constable by a metropolitan police magistrate under the authority of the Great Eastern Railway (General Powers) Act, 1900 (63 & 64 Vict. c. cx.), s. 50. (1)

(1) Sect. 50 enacts: "Subject to the conditions herein set forth any two justices having jurisdiction in any one of the counties cities or boroughs in which the constables are to act may on the application of the company appoint all or so many as they think fit of the persons recommended to them for that purpose by the company to act as special constables upon and within the whole of the railway stations and works belonging or leased to or worked by the company either solely or jointly with any other company or companies or any committee or committees and every or any part thereof respectively and the following provisions shall apply to every appointment made:—

"(1.) Every person so appointed shall make oath or declaration in due form of law before any justice having jurisdiction in any one of the counties cities or boroughs in which such person is to act duly to

C. A. 1909

LAMBERT v. GREAT EASTERN RAILWAY.

The action was tried before Grantham J. and a special jury. Upon the question of malicious prosecution the jury found for the defendants, but upon the question of false imprisonment they gave a verdict for the plaintiff for 10*l*.

The learned judge, however, held that the constables were in the position of ordinary constables and were not acting as the servants of the company, and he directed judgment to be entered for the defendants upon the whole action.

---

execute the office of a constable:

"(2.) Every person so appointed and having been sworn or having made such declaration as aforesaid shall during the continuance of his appointment have all the powers protection and privileges of a constable in respect of the exercise of his duties and may follow and arrest any person who has departed from any of the said railway stations or works after committing therein or thereon any offence for which he might have been arrested while within or upon the said railway stations or works:

"(3.) Any two justices assembled and acting together or the company may dismiss from his office or accept the resignation of any constable so appointed and thereupon all powers protection and privileges belonging to such person by virtue of such appointment shall wholly cease. No person so dismissed or resigning shall be capable of being re-appointed except with the consent of the authority by whom he was dismissed:

"(4.) The local authorities of any county city or borough shall not be liable for any expense of or be responsible for any acts or defaults of such constables or for anything connected with or consequent upon their appointment and nothing in this Act contained shall restrict or affect the jurisdiction or powers of the respective local authorities of the county city or borough as the case may be or the police force under their control:

"(5.) A constable appointed as aforesaid shall not act as such under the authority of this Act unless he be in uniform or provided with an authority to act as a constable which authority the justice before whom such constable makes oath or declaration as aforesaid is hereby empowered to grant and if the constable be not in uniform he shall show such authority whenever called upon to do so."

The plaintiff asked for a new trial as regards the malicious prosecution on the ground that the judge had misdirected the jury by submitting to them the question whether the plaintiff had failed to prove an absence of reasonable and probable cause without first giving the plaintiff's counsel an opportunity of addressing the jury upon the point; and as regards the false imprisonment he asked for judgment in accordance with the verdict on the ground that the judge was wrong in law in holding that the constables were in the position of ordinary constables; and alternatively he asked for a new trial of the whole action.

The arguments are only reported upon the question of the position of special constables of a railway company.

C. E. Jones and *A. Humphry Williams*, for the applicant. The special constables in arresting the plaintiff were acting as the servants of the defendants, and if they made a blunder the defendants are responsible. Further, the subsequent prosecution by the defendants was a ratification of the arrest: *Abrath* v. *North Eastern Ry. Co.*(1); *Moore* v. *Metropolitan Ry. Co.*(2); *Edwards* v. *Midland Ry. Co.*(3); *Eastern Counties Ry. Co.* v. *Broom.*(4)

J. B. Matthews and *G. F. Spear*, for the respondents. These constables have the special powers and immunities given to ordinary constables, including the power of arresting on suspicion of felony. These special powers are given to the police force for the protection of the public and depend upon public policy. The railway company had no power to appoint anybody to arrest persons on suspicion of felony. That is the special and peculiar privilege of the constable. In exercising this special power these constables were acting as servants of the King and not as servants of the company. Inasmuch as the company itself has not that power, it cannot clothe its servants with that power. The same argument applies to the question of ratification. If the arrest is made on behalf of the King and not on behalf of the company, no ratification is possible by the company.

(1) (1883) 11 Q. B. D. 79.
(2) (1872) L. R. 8 Q. B. 36.
(3) (1880) 6 Q. B. D. 287 50 L. J. (Q.B.) 281.
(4) (1851) 6 Ex. 314.

C. A. 1909

LAMBERT v. GREAT EASTERN RAILWAY.

[KENNEDY L.J. referred to *Walker* v. *South Eastern Ry. Co.* (1) COZENS-HARDY M.R. referred to *Goff* v. *Great Northern Ry. Co.* (2)]

C. E. Jones, in reply.

COZENS-HARDY M.R. This appeal raises one question of general interest and importance. The material facts are shortly these. The Great Eastern Railway Company have, under the provisions of s. 50 of their General Powers Act, 1900, procured the appointment of certain persons (whose names are Cross and Wooderson in this case) to act as special constables on the whole of their stations, and they have a police department at Liverpool Street which superintends all their special constables throughout their line. On March 25, 1908, as the result of a communication received by the railway company on March 2, an arrest was made by one of these constables of the plaintiff, who is a boy of seventeen. He was arrested as a thief. He was taken to the police office, he was ultimately brought before the magistrates, the magistrates discharged him, and it is not suggested by anybody in the course of this trial that the plaintiff, the boy, was in fact a thief, or could be in any way charged with being a thief. It is admitted that he did abstract from the parcel of newspapers which came down to Romford fifteen copies of the *Essex Times*, but it was said, and there was a good deal of evidence to that effect, that this is what had been done for a considerable length of time, presumably to the knowledge of the person to whom the papers were consigned and also of the railway company. In other words, it is said that he was merely taking from the parcel of newspapers the newspapers which his father had agreed to buy from Wilson & Whitworth, who sent the parcel down at an earlier time than Wilson & Whitworth's Romford house was open, in order to enable him to deliver them to his father's customers at Romford and to complete his round before he took the train to Brentwood, where he went to school. The jury, not in terms, but substantially, I think, found that there was no reasonable and probable cause for the arrest, and that the policeman had no

(1) (1870) L. R. 5 C. P. 640. (2) (1861) 3 E. & E. 672.

reasonable ground for thinking that there was a felony committed, or that the boy Lambert was a thief, if anybody was a thief; but the learned judge has held that there is something in the special provisions of this s. 50 which exempts both the constables and the constables' employers from any liability in respect of that imprisonment. Now that raises this question: What is the precise position of these constables? Are they the servants of the King, as Mr. Matthews says, or are they not? It seems to me quite plain under s. 50, the material parts of which I will read in a moment, that they are the servants of the company, and that the relation of master and servant exists between them. Sect. 50 is this: [The Master of the Rolls read it.] What is the position of these constables? The county authorities who have to do with the ordinary police force are expressly exempted and excluded from all jurisdiction in the matter. They cannot either appoint or remove. They do not pay. It is the railway company who employ; it is the railway company who pay; it is the railway company who dismiss; and in these circumstances it seems to me these are men bound to obey the orders of the railway company, and bound to obey no other orders of any sort or kind, and that in the acts which they did they acted as servants of the company. No doubt they are servants who are given a special immunity and protection, and they have the peculiar protection which other constables have, namely, that they are not liable if they have reasonable ground for believing that a felony has been committed, and that the person whom they have arrested was guilty of a felony. If they had such reasonable grounds, their employers, I take it, would not be liable for their acts, but if they had not reasonable grounds, then it seems to me that their employers must be liable.

This has been treated as though it were an entirely new question, not dealt with or considered by the Courts before. I think that is really not quite an accurate view. Legislation of this kind is by no means modern. I think this section, almost in its words, is found in one of the Canal Companies' Acts. Certainly the employment of special constables by railway companies is a thing which has been recognized by Parliament for pretty nearly eighty years—at any rate for more than

C. A. 1909

LAMBERT v. GREAT EASTERN RAILWAY.

Cozens-Hardy M.R.

seventy years—and the fact that it is within the scope and within the duties of railway companies to employ police constables (whether in plain clothes or not makes no difference) has been decided by authority which is now beyond doubt. I do not think I should want the assistance of authority on that point, but if I did want it I should find it very plainly, forcibly, and clearly laid down by Blackburn J. in the case of *Goff* v. *The Great Northern Ry. Co.* (1) He there says: "Then, was there evidence that the parties concerned in apprehending the plaintiff, or some one of them, was an officer having such authority from the company? It is difficult to see why the company pay the police, if the inspector of their police is not to act for them to this extent; but there is more in this case. We find that the ticket collectors, and the ticket clerk, and the police, and all the persons acting for the company, go to the office of the superintendent of the line, and refer to him as the superior authority." I think, therefore, that the railway company must accept the position that they were liable to the extent to which their servant and agent is liable—not further than that, but to that extent.

Then the matter again came before Sir Edward Fry in the case of *Edwards* v. *Midland Ry. Co.* (2), which is much more fully and satisfactorily reported on this point in the *Law Journal* than it is in the Law Reports. That was not an action for false imprisonment, but it was an action for malicious prosecution. There the man had been arrested and charged with theft from the company on a warrant, and was taken before two justices, and there was a considerable argument upon the position of the railway company with reference to these policemen. Sir Edward Fry there says: "Now these great railway corporations are bound to maintain, and in fact they do maintain, police for the purposes of restraining the commission of crimes upon their railways; and the observations in the judgment of Lord Blackburn, then a member of the Court of Queen's Bench, in the case of *Goff* v. *The Great Northern Ry. Co.* (1) shew that in his view, at any rate, a company would be responsible for the arrest by

(1) 3 E. & E. 672, at p. 682.
(2) 6 Q. B. D. 287; 50 L. J. (Q.B.) 281.

their police of persons, supposing the arrest was wrongfully effected. Can it be said that if the police whom they employ conduct a prosecution in the performance of their duties as officers of the company it is not done within the scope of incorporation of the company? The company take to themselves as a necessary part of their business the protection of property which is entrusted to them as common carriers and otherwise. In my view it is within the scope of their incorporation." I think, therefore, that the learned judge was wrong in holding that it was a complete answer to the case to say that these constables were special constables having such special privileges as made them and their company immune from all actions at law. That is the ground, and the only ground, upon which the learned judge entered judgment for the defendants, although the jury had found a verdict in favour of the plaintiff with 10*l.* damages on that part of the action which related to false imprisonment. In my opinion that judgment cannot stand, but (and this is a part of the case on which, as I think, it is desirable that I should say but little) I think it is impossible, having read carefully, and considered carefully, the summing up of the learned judge in this case, to say that the questions put to the jury were so put as, having regard to the authorities, they ought to have been put, either with regard to that part of the action which relates to malicious prosecution or with regard to that part which relates to false imprisonment. In my opinion, without saying anything more, and advisedly without saying anything more, on this part of the case, I think the judgment must be set aside, and there must be a new trial, unless, as I would venture to hope, the parties can come to terms.

FARWELL L.J. I agree, and I have nothing to add.

KENNEDY L.J. I agree.

New trial ordered.

Solicitors for applicant: *Surridge & Mullis.*
Solicitor for respondents: *E. Moore.*

H. B. H.

1909
July 7, 19.

Referred to. In re A DEBTOR. [1949] 1 Ch. 286

In re BENOIST.

Bankruptcy—Practice—Receiving Order—Proposal for a Composition rejected by the Creditors—Debtor's Application to expunge a Proof—Locus standi of Debtor—Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 25—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

Rule 25 in Sched. II. to the Bankruptcy Act, 1883, which empowers the Court to expunge or reduce a proof, in the case of a composition or scheme, upon the application of the debtor, means a composition or scheme that is pending before the Court, i.e., that has been accepted by the creditors.

As a general rule, therefore, a debtor has no locus standi to apply to expunge or reduce a proof either before his proposal for a composition or scheme has been accepted by the creditors or after it has been rejected, but the Court may in exceptional circumstances—as in *Ex parte Bluck*, (1887) 4 Morr. 273—entertain such an application.

THIS was an application by a debtor to expunge a proof against his estate in these circumstances.

On March 15, 1909, a receiving order was made against the debtor on a creditor's petition. On April 26 one Horvath lodged a proof against the debtor's estate for 3200*l.*, but the debtor disputed the debt, and the proof was not admitted by the official receiver. The debtor filed his statement of affairs in due course, but did not enter the name of Horvath therein as a creditor. On May 27 a meeting of the creditors was held to consider a proposal by the debtor to pay his creditors a composition of 7*s.* 6*d.* in the pound in satisfaction of their debts, but the meeting was adjourned to June 18. In the meantime, on June 11, the debtor launched a motion to expunge Horvath's proof for 3200*l.* On June 18 the debtor failed to carry his proposal for a composition, and the creditors passed a resolution for his adjudication. On June 28 the official receiver, in pursuance of the resolution of the creditors, applied to the Court to adjudicate the debtor a bankrupt, but it was ordered that the application should stand adjourned to July 19, and that, upon payment to the official receiver of the necessary fees, the debtor should be at liberty to have a fresh meeting of his creditors for the purpose of submitting a further proposal for a composition.

On July 7 the debtor's motion to expunge Horvath's proof came on for hearing.

1909

BENOIST, *In re.*

F. Mellor, for the debtor. Compositions or schemes are now regulated by s. 3 of the Bankruptcy Act, 1890, and under r. 25 of Sched. II. to the Bankruptcy Act, 1883, the debtor can apply to expunge any proof that he disputes: *In re Calvert.* (1)

Schiller, for Horvath. The debtor has no locus standi to be heard, for there is no composition or scheme pending before the Court. In *In re Calvert* (1) the composition had been accepted by the creditors; here they have refused it.

[PHILLIMORE J. referred to *Ex parte Bluck.* (2)]

That case is distinguishable. There the creditor had voted against the scheme, which, but for his vote, would have been accepted. Here the creditor's proof was not admitted and the composition was rejected. There is nothing before the Court, and the application is altogether premature.

F. Mellor, in reply. It is admitted that at the present moment there is no scheme, but the motion was launched when there was a scheme before the Court, and on June 28 the debtor obtained leave to submit a new scheme. That new scheme is now ready and provides for a cash payment of 7*s.* 6*d.* in the pound on all provable debts, and the debtor will undertake that the new scheme shall be lodged at once and that all the necessary fees shall be paid. (3) It is impossible for a debtor to know the amount of cash he must pay into Court under his scheme unless he knows the amount of the provable debts, and for that purpose it is most important that he should be at liberty to apply to expunge the proofs that he disputes. The language of r. 25 does not necessarily import that the composition or scheme has been accepted by the creditors and sanctioned by the Court. In *Calvert's Case* (1) the scheme had not been sanctioned by the Court, and in *Bluck's Case* (2) there was no scheme at all before the Court. It is submitted that it is sufficient if a bona fide proposal for a composition or scheme is lodged with the Court before the debtor applies to

(1) (1899) 6 Man. 209.
(2) 4 Morr. 273.
(3) This was done during the mid-day adjournment of the Court.

1909

BENOIST, *In re.*

expunge a proof, and that the present application is in accordance with the practice.

PHILLIMORE J. I will adjourn the application to ascertain what the practice is in these cases. If I find that the practice does not warrant the application, I will deliver judgment at once. If I find that the application accords with the practice, I will then hear it on its merits and determine it.

July 19. The application came on again this day.

PHILLIMORE J. I feel there are considerable difficulties in this case, and, there being difficulties, I think the best course to adopt is to construe the words of the 25th rule strictly. Reading those words strictly, I cannot construe them to mean "in the case of an anticipated composition or scheme." I think they point to a composition or scheme which has been accepted by the creditors and is therefore pending before the Court. But then it is said, and it is true, that in *Ex parte Bluck* (1) Cave J. did allow a debtor to move to expunge a proof after a scheme had been rejected by the creditors. There were, however, very special circumstances in that case, because the scheme had been rejected by reason of the weight of the vote of a creditor whose proof had been admitted and whose proof the debtor sought, and sought successfully, to expunge. Here the proof has not been admitted for voting, and the debtor launched his motion before the composition had been considered by the creditors, and the composition was rejected. It may be that, after a composition or scheme has been lodged and rejected by the creditors, a debtor may have a locus standi to apply to expunge a proof. I do not say that it is so: when such a case arises I shall have to consider it. In the present case I am of opinion that the application cannot be allowed. No doubt it is very desirable that a debtor should be able to satisfy the Court at the earliest opportunity that a creditor whose proof has been admitted has not a provable debt, but that form of argument is really putting the cart before the horse. There are inconveniences the other way, because a

(1) 4 Morr. 273.

creditor who successfully resists a debtor's application to expunge his proof would probably find that he could not get paid his costs of the application. Therefore, on the balance of convenience and inconvenience, I also think that this application ought not to be allowed. I adjourned the matter the other day to ascertain if the practice warranted the application. Mr. Registrar Hope has looked very carefully into the practice and informs me that he has only been able to find one case where a debtor was allowed to apply to expunge a proof when there was no scheme in existence. It is an unreported case of *In re R. T. Baker* which came before the Court in August, 1907, when Bigham J., under very special circumstances, heard the application on its merits and dismissed it. It is therefore not of much assistance. On the whole, therefore, I hold that the objection prevails and that this application must be dismissed.

Schiller. I ask for costs.

PHILLIMORE J. Your costs are not a provable debt, but you can add them to your proof. If you have a provable debt you may perhaps eventually get your costs from the debtor. But if you have not a provable debt you will not get any costs.

Solicitors: *H. H. Wells & Sons; W. O. Vizard.*

H. L. F.

1909

July 25, 29.

In re PILLING.

Bankruptcy—Practice—Costs—Proposal for a Scheme—Debtor's Application to expunge a Proof dismissed—Adjudication—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 105; *Sched. II., r.* 25.

Where, after a receiving order, the debtor carries a composition or scheme, and any applications by him to expunge proofs are dismissed with costs, he must pay such costs in addition to what he pays under the composition or scheme. But if he fails to carry the composition or scheme and is adjudicated a bankrupt, such costs, not being a debt provable in the bankruptcy, are not payable out of the estate and remain a debt enforceable against him after his discharge.

Application by creditors for payment of their costs out of the bankrupt's estate in these circumstances.

After a receiving order had been made against the debtor in September, 1898, he proposed a scheme of arrangement which his creditors accepted, but which the Court in July, 1902, declined to sanction. In October, 1902, he proposed a fresh scheme of arrangement, and at the same time moved to expunge the proofs of two of his creditors that had been admitted. His applications were heard by Wright J. in December, 1902, and both of them were dismissed with costs. The debtor failed to carry his scheme of arrangement and was ultimately adjudicated a bankrupt. His estate had since paid a dividend of 5*s.* in the pound, and the trustee in bankruptcy had now some further moneys in his hands, and the two creditors in question applied to him for payment out of the estate of their taxed costs of the debtor's motions that had been dismissed in December, 1902. The trustee was willing to pay these costs if the sanction of the Court could be obtained for that purpose. The two creditors accordingly now applied for an order that their taxed costs of the debtor's motions in December, 1902, might be paid out of the estate. The debtor had not been discharged.

T. E. Mansfield, for the application. The creditors are not seeking to vary the order of Wright J., but only ask for a supplemental order that these costs should be paid out of the estate. The Court has jurisdiction to make such an order:

1909

PILLING, *In re.*

Preston Banking Co. v. *William Allsup & Son.* (1) It is also submitted that Wright J. intended these costs to be paid out of the debtor's estate. At that date only a receiving order had been made, the debtor's property was still vested in him, and there was a pending scheme of arrangement.

[PHILLIMORE J. referred to *In re Benoist.* (2)]

In that case there was no scheme pending before the Court. Further, under s. 105 of the Bankruptcy Act, 1883, costs are in the discretion of the Court, and it is submitted that the Court can now make an order that, notwithstanding the order of Wright J., these costs should be paid out of the estate. The debtor is abroad and is not likely to apply for his discharge, and it is very hard if these creditors are to lose their costs of successfully resisting the debtor's attempt to expunge their proofs. There is no direct authority on the point.

Cur. adv. vult.

July 29. PHILLIMORE J. delivered a written judgment as follows: These are two applications by creditors in this bankruptcy that the costs which they incurred in successfully resisting applications by the debtor to expunge their proofs should be allowed in full out of the estate. It appears that after a receiving order had been made the debtor proposed a scheme, and that while the consideration of the scheme was pending he made these applications to expunge. The applications came before Wright J. in December, 1902, and were dismissed. The order, or orders, of dismissal said that the costs should be paid by the debtor. The proposal for the scheme failed and the debtor was adjudicated a bankrupt. A dividend has been paid out of the estate, but it seems improbable that the creditors will be paid in full and the debtor has not yet received his discharge. In these circumstances the two creditors made application to the trustee that he should pay them their costs of resisting the applications before Wright J. out of the estate. This the trustee is willing to do if he can get some authority to sanction it, and application is accordingly made to me. Counsel for the creditors submits

(1) [1895] 1 Ch. 141. (2) Ante, p. 784.

1909

PILLING, *In re.*

Phillimore J.

that the application is not one to vary the order of Wright J., but for a supplemental order giving his clients an additional remedy, according to the principle admitted by the Court of Appeal in *Preston Banking Co.* v. *William Allsup & Son.*(1) This is possible. He also submitted that upon the true construction of the order of Wright J. their costs, in the event of an adjudication, should be paid out of the estate. This view I cannot take. He further submitted that I had jurisdiction under s. 105 of the Bankruptcy Act, 1883, to make this order. It may be that I have jurisdiction, and the order made by the Court of Appeal on another application in this bankruptcy on June 19, 1903, tends to shew that I have jurisdiction. But it does not follow that it would be proper to make the order in this case. A creditor has to bear the cost of proving his debt. If a motion is made by the trustee to expunge a creditor's proof and the motion fails, the trustee may be ordered to pay him his costs. So I apprehend if the application is made by an adverse creditor he may be ordered to pay the costs. So if an application is made by the debtor and the debtor carries through a composition or scheme and escapes adjudication. But if he is adjudicated bankrupt, the obligation to pay the costs is one which has accrued after the date of the receiving order, and in respect of which there can be no proof in bankruptcy, and which, therefore, remains a debt enforceable against the bankrupt after and notwithstanding his discharge. In my view the order of Wright J. determined the incidence of the costs in manner following. If the debtor had carried through a scheme he would have had to pay these costs in addition to what he paid these creditors under this scheme. As he has been adjudicated bankrupt, he will have to pay these costs if and when he gets funds when he is discharged. I adjourned this case in order that I might make some inquiry into the practice, and I cannot find that there is any which would warrant any different order. As far as I can gather, the practice is adverse to these applications. I have considered whether I could at least give the creditors the advantage of being allowed to add these costs to their debt, and to prove for them, not disturbing previous dividends, but with

(1) [1895] 1 Ch. 141.

1909

PILLING, *In re.*

Phillimore J.

regret I can find no authority or principle to justify me in so doing. It seems a hardship upon creditors that an insolvent debtor should be able to put them to this almost irrecoverable expense. I pointed out recently in the case of *In re Benoist* (1) that a similar hardship was one of the reasons why a debtor should not be allowed to move to expunge a proof unless he had got a composition or scheme agreed. In that case there was no scheme pending at the time when the debtor moved, and all I had to decide was that in those circumstances the debtor had no locus standi. This case seems to shew that it would be well if it could be determined that the debtor had no such locus standi while a scheme was pending, or that he should not be allowed to move without first finding security.

Solicitors: *Grant, Davies & Co.*

H. L. F.

[IN THE COURT OF APPEAL]

C. A.

1909

July 20.

SUTTON *v.* GREAT NORTHERN RAILWAY COMPANY.

Employer and Workman—Compensation—Practice—Interrogatories—Discovery—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II.* (4.)—*Workmen's Compensation Rules*, 1907, *r.* 27.

A county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1906, is acting as an arbitrator only, and has no jurisdiction to make an order for discovery before hearing either by affidavit of documents or by interrogatories.

Mountain v. *Parr*, [1899] 1 Q. B. 805, applied.

APPEAL from the decision of the judge of the Hitchin County Court discharging an order made by the registrar for discovery under the following circumstances.

A claim for compensation under the Workmen's Compensation Act, 1906, by a workman against his employers, the railway company, having been made and arbitration proceedings having been started, application was made on behalf of the workman to

(1) Ante, p. 784.

C. A. 1909

SUTTON v. GREAT NORTHERN RAILWAY.

the registrar of the county court for discovery before the hearing.

On May 6 the registrar made two orders against the railway company, one for an affidavit stating what documents they had in their possession relating to the matters in question, and another giving the applicant leave to deliver interrogatories and ordering the railway company to answer them.

The county court judge, on the application of the railway company, discharged the order of the registrar.

The workman appealed.

J. A. Simon, K.C., and *Thorn-Drury*, for the appellant. Rule 27 (1.) of the Workmen's Compensation Rules, 1907, assimilates proceedings under the Workmen's Compensation Act to proceedings in the ordinary county court action, and the rules for the time being in force are to apply to such arbitration accordingly. By Sched. II. (4.) of the Workmen's Compensation Act, 1906, the Arbitration Act, 1889, is not to apply, but the county court judge is to have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were in an action in the county court.

The County Court Rules, 1903-1904, by Order XVI., rr. 21, 22, and 23, make special provision for discovery and for interrogatories, the costs of which are to be allowed as part of the costs of the action, if reasonable. Order LIII., rr. 7 and 8, make provision for this, and give various scales of costs and allowances. *Mountain* v. *Parr* (1), on which the county court judge relied, is distinguishable; that case might have been decided on the express wording of Sched. II. (4.)—on this point the same as in the Act of 1906—which enacts that the decision of the county court judge is to be final unless there is an appeal to the Court of Appeal, thus negativing the right to move for a new trial. That case has no bearing on the question of discovery.

As a matter of practice orders for discovery of this kind have in fact been constantly made; and form 67 in the Workmen's Compensation Rules gives "application by applicant for discovery," shewing that the Rule Committee evidently thought

(1) [1899] 1 Q. B. 805.

they were arranging for interrogatories and discovery. Rule 70 of these rules shews that these proceedings are not in the nature of an ordinary arbitration; and r. 80 also says that where not otherwise provided for by these rules the County Court Rules and procedure are to apply. The judge therefore has jurisdiction to make these orders for discovery under the Workmen's Compensation Act just as he has in an ordinary county court action.

M. Lush, K.C., and *Eustace Hills*, for the respondents, were not called upon.

COZENS-HARDY M.R. This appeal raises a question of importance, but having considered the Act and Rules, particularly the Act, it is one on which I have formed a clear opinion, quite apart from the decision of this Court in *Mountain* v. *Parr*. (1)

Now the first and governing feature of cases of this kind is that they are arbitrations—they are not actions. That is a proposition which is to be found in almost every section of the Act of Parliament. It is a proposition which was affirmed by the House of Lords in *Powell* v. *Main Colliery Co., Ld.* (2) most strongly, and it is a proposition which I think admits of no doubt. But although it is an arbitration, it is an arbitration of a very peculiar kind. It is not an arbitration in which the arbitrator has all the powers, and none but the powers, which he would have under the Arbitration Act. We are bound to scan the Act itself and see what are the powers conferred by the statute upon this statutory arbitrator, if I may so call him, remembering also this—that the powers which are given to the arbitrator, and which are usually exercised by the county court judge as arbitrator, are also powers which may be exercised by lay arbitrators.

The most important provision of all is clause 4 of the Second Schedule of the Act. That says that the Arbitration Act, 1889, shall not apply to an arbitration under that Act. So that we are outside that Act altogether. But then it goes on, after providing that the decision of the arbitrator is to be final but subject to appeal to the Court of Appeal, in this way: "And the judge of the county court, or the arbitrator appointed by him, shall,

(1) [1899] 1 Q. B. 805. (2) [1900] 2 Q. B. 145; [1900] A. C. 366.

C. A. 1909

SUTTON v. GREAT NORTHERN RAILWAY.

Cozens-Hardy M.R.

for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court" — that is to say, issue subpœnas for the production of documents, or for the attendance of witnesses; but there is nothing there to be found such as one would expect to find, if it were intended that this arbitrator should have the power of giving liberty to deliver interrogatories, and of making an order requiring the respondents, or the person who is served, to answer those interrogatories under the penalties for perjury. The power of making rules of Court is found in clause 12 of the Second Schedule, which says that rules of Court may be made "generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator." That, of course, does not enlarge the powers given by the Act itself; it merely provides machinery for giving effect to the statutory enactments contained in the body of the Act itself. But it is argued that there is r. 27, which says: "Subject to the special provisions of these rules, the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly." Then it goes on to say that, in the application of such provisions and rules, "the applicant's request for arbitration shall be deemed to be a summons with particulars annexed" and so on. I should have very much doubted whether those words "procedure in an arbitration shall be the same as the procedure in an action" would have included the case of interrogatories or of an order to answer interrogatories; but, be that as it may, I go back to the Act itself, and I find nothing in the Act empowering the statutory arbitrator to do that which no arbitrator can do, that is, make an order for discovery or an answer to interrogatories. Thus far I have dealt with the matter apart from authority.

C. A.
1909
SUTTON v. GREAT NORTHERN RAILWAY.
Cozens-Hardy M.R.

But when one comes to the decision of this Court in *Mountain* v. *Parr* (1), a case which was decided ten years ago, and which, so far as I am aware, has never been qualified, or dissented from, or discussed in any way, that seems to me a decision the principle of which really decides this case adversely to the applicant. It is quite true, as Mr. Simon forcibly argued, that that case might have been decided on the express language of clause 4, namely, that when it is said the decision of the arbitrator should be final unless reviewed by the Court of Appeal, that was an express negativing of the right to move for a new trial: but the learned judges did not deal with it on that narrow ground; they purposely treated the matter on the lines I have endeavoured to indicate. They said this was not an action, but that it was an arbitration. A. L. Smith L.J.'s judgment has been read in full, and I will not read it again. I prefer simply to refer to what Collins L.J. said: "It is clear that the Legislature has expressly enacted that when sitting under this Act a county court judge is to be an arbitrator only; any provisions in the rules which appear at first sight inconsistent with this view are easily made to conform to it when their object is carefully examined." Then Romer L.J. said: "It is quite clear that where the rules under this Act provide that the County Court Rules are to apply, it can only mean that they are to apply with the necessary modifications" (those words were in the rule itself, and they are not an interpretation put on it by Romer L.J.) "having regard to the fact that proceedings under the Act are proceedings in an arbitration, and not in a county court action."

I therefore think the learned county court judge was right in the conclusion which he reached by a somewhat unwilling process, but which he did reach, and that he was right in discharging the order of the registrar; and, if I may say so, I am glad to arrive at that conclusion, because I think there might be in many cases of this kind great waste of money on interrogatories, although there might be occasionally a case in which the administration of interrogatories would be advantageous.

I think this appeal fails, and that it must be dismissed with costs.

(1) [1899] 1 Q. B. 805.

C. A. 1909

SUTTON v. GREAT NORTHERN RAILWAY.

FARWELL L.J. I am of the same opinion. One has to bear in mind that the right to compensation under this Act is not a right based on tort or any other cause of action, but it is a statutory right given by the Legislature; and the Legislature, having given the right to compensation, by s. 1, sub-s. 3, provides that the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to the Act, "be settled by arbitration in accordance with the Second Schedule to this Act." That is the only procedure provided at all, namely, arbitration; and when I turn to the Second Schedule I find in clause 4 the words read by the Master of the Rolls, and the only provisions for discovery the subpœna ad testificandum and the subpœna duces tecum. There is no suggestion of any right to interrogatories at all. Then the power to make rules is to make rules in accordance with the Act and not beyond the Act. I see in the excellent work on the previous Compensation Acts by Parsons and Bertram, 2nd ed., p. 104, this statement of Lord Halsbury's in *Powell* v. *Main Colliery Co., Ld.* (1) is cited, which I should like to adopt as my own: "Rules made under this or any other provision of the Act have not such effect as to derogate from the rights conferred by the Act itself, nor is the interpretation, which the framers of the rules in any case seemed to have placed upon the Act, any evidence of the meaning of the words of the Act." We are referred to the rules made under that provision, and especially to r. 27. Reading that rule fairly, it seems to me to be intra vires; but if I were to come to the conclusion that it means what Mr. Simon has contended it means, I think it would be ultra vires, inasmuch as the Act refers only to the two schedules, and, on the doctrine of expressio unius in relation to the exclusion of interrogatories, it seems to me impossible that any rule made by the learned county court judges under this provision could give a power which the Act had impliedly excluded. The words are "the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly." That to my mind means this: you take the

(1) [1900] 2 Q. B. 145; [1900] A. C. 366.

County Court Rules and apply them, but you cannot of course extend the statutory provisions of the Workmen's Compensation Act by applying rules which go beyond the subject-matter of the Act, still less rules in contravention of the Act; and you cannot extend the operation of these rules by inference, as has been argued. Legislation by reference always creates difficulties, and care is required to take only the apt and not the inapt references.

I think the learned county court judge came to a correct conclusion, and I agree with the Master of the Rolls, that having regard to the nature of the claim the Legislature never intended, nor would it be reasonable that there should be, the great expense always incident to interrogatories. Although in this particular case it might be perfectly proper, there are many in which it would be improper to inflict on the claimant or on the respondent such an increase of costs as would be occasioned if there was power to order interrogatories.

KENNEDY L.J. I am of the same opinion. It appears to me that in principle, as has been already said, the point before us was decided by this Court ten years ago in *Mountain* v. *Parr*. (1) But if there had been no such decision, speaking for myself, I cannot doubt that the view at which ultimately the learned county court judge arrived, although only in deference to authority, was the true one, and that, the proceeding being essentially an arbitration proceeding under special provisions which were thought necessary by the framers of the Act, this application for leave to administer interrogatories is an application that could not succeed.

Appeal dismissed.

Solicitors: *Pattinson & Brewer; R. Hill Dawe.*

(1) [1899] 1 Q. B. 805.

W. C. D.

C. A.
1909
July 22.

[IN THE COURT OF APPEAL.]

HUGHES *v.* CLOVER, CLAYTON & CO., LIMITED.

Employer and Workman—Compensation—Accident—Disease—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman in the employment of a firm of shipbuilders, while engaged in tightening a nut with a spanner and pressing down the spanner, suddenly fell down dead. The post-mortem examination shewed that the man was suffering from a very large aneurism of the aorta, that he died from rupture of the aorta, and that the rupture might have been brought about by very slight exertion.

The county court judge found that death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal:—

Held, that this was an "accident" within the meaning of the Workmen's Compensation Act, 1906.

This was an appeal against an award of the county court judge of Lancaster sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The facts as found by the learned county court judge were as follows. The applicant was the widow of a workman who was employed by the original respondents, who were shipbuilders. On March 9 he was assisting in making a condenser bath. He was engaged in tightening a nut with a spanner, pressing down upon the spanner, when a fellow workman saw his left foot apparently slip forward, and he fell back. He tried to recover himself, uttered an exclamation, and fell on his back, striking his head. He was taken aside and found to be dead. On a post-mortem examination it was found that there had existed a very large aneurism of the aorta, and death was attributed to the rupture of the aorta. The aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture. The learned judge did not think that there was sufficient evidence to enable him to hold that the deceased man did in fact slip. He came to the conclusion that the exertion of tightening the nut

with the spanner caused the rupture. There was no evidence from which any exact conclusion could be drawn as to the extent of strain that was being put on the deceased at the time, but it was at all events not more than ordinary in such work. The evidence, however, satisfied the judge that such strain was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time, and he found as a fact that the rupture was so brought about. The death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.

In these circumstances the learned judge held that on the authorities there was an accident within the meaning of the Act, and he made his award in favour of the applicant.

The employers appealed.

Simon, K.C., and *Cuthbert Smith*, for the employers. The question in this case is whether the death was caused by an accident. This is distinguishable from all the other cases because there was here no unusual exertion. The death was due to the enfeebled state of the body. The deceased man was doing his ordinary work in the ordinary way, and owing to his state of health death might have happened while he was lying in his bed. Until *Fenton* v. *Thorley* (1) it was thought that cases of rupture were not within the Act. That is no longer true, but still there must be something out of the ordinary run to constitute an accident. In that case there was an unexpected difficulty in moving the wheel of the machine. In *Wicks* v. *McDowell & Co., Ld.* (2) the man fell into the hold; there was therefore a real accident in the ordinary sense, and what the Court there decided was that it did not matter that the accident would not have happened if the man had not had a fit. Here there was no external accident at all. [They also referred to *Ismay, Imrie & Co.* v. *Williamson.* (3)]

A. Powell, K.C., and *Stewart-Brown*, for the applicant, were not called upon.

(1) [1903] A. C. 443. (2) [1905] 2 K. B. 225.
(3) [1908] A. C. 437.

C. A. 1909

HUGHES v. CLOVER, CLAYTON & Co., LIMITED.

COZENS-HARDY M.R. This is an appeal from the county court judge of Liverpool, and it raises a point which is undoubtedly one of importance. The point has been very clearly stated in the judgment of the learned county court judge and has been very forcibly called to our attention by the arguments of counsel. The deceased man was a boilermaker, and he was engaged in tightening a nut with a spanner, obviously involving considerable exertion. He was a man who at that time, as is proved by the post-mortem examination, had an aorta which was in a very dangerous state. He died owing to the rupture of this aorta, and the learned judge has found as a fact that the strain put upon the deceased by the exertion of tightening the nut with the spanner caused the rupture. He says the evidence satisfies him that the strain was sufficient to bring about a rupture of the aneurism, having regard to the man's condition at the time, and he finds as a fact that the rupture was so brought about. That being so, taking those facts as conclusive for us, is that or is that not an accident within the meaning of the word in the statute? In my opinion, according to the authorities, it plainly is. As I said in *Wicks* v. *McDowell & Co., Ltd.* (1), every man brings some disability with him. An exertion or any external action which might have been entirely innocuous to a man in good health might produce most serious results to a man bringing with him some disability. This man brought with him a disability of a serious nature, an aneurism, which I quite agree might have caused his death at some time or other without any exertion, usual or unusual. But here we have this fact—a strain in the course of the ordinary discharge of his duties causing the rupture from which the man dies. Now, as I read the decisions of the House of Lords, it is not open to this Court to say that that is not an accident. It is impossible, I think, to read the judgment of Lord Macnaghten in *Fenton* v. *Thorley* (2) without seeing that this case is exactly and precisely within the language which he used. But if there were any doubt about that, the more recent decision of the House of Lords in

(1) [1905] 2 K. B. 225. (2) [1903] A. C. 443.

Ismay, Imrie & Co. v. *Williamson* (1) is really a much stronger case than this. That was a case where a man worked in the stokehold of a steamer. He was a very feeble, weakly man, suffering from great physical debility which a man of ordinary strength doing similar work would not have suffered from. What the present Lord Chancellor (Lord Loreburn) says is: "To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat-stroke was by physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. In the case of *Fenton* v. *Thorley* (2) the meaning of the word accident was very closely scrutinized. That case stands as a conclusive authority, and I would not depart from it if I could, nor need I repeat what was there said. The only question is of applying the law there laid down to the particular facts of this case. In my view this man died from an accident. What killed him was a heat-stroke coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience, in this instance, had not taught. It was an unlooked for mishap in the course of his employment. In common language, it was a case of accidental death." Lord Ashbourne, agreeing with the Lord Chancellor, refers in terms of approval to the decision of *Stewart* v. *Wilsons & Clyde Coal Co.* (3), in which Lord M'Laren used words exactly applicable to the present case. "If a workman in the reasonable performance of his duties sustained a physiological injury as the result of the work he is engaged in, this is an accidental injury in the sense of the statute." In the present case this workman in the reasonable and ordinary discharge of his duties by reason of a strain sustained a physiological injury, namely, the rupture of his aorta. That was the result of the strain from the work on which he was engaged, and that is an accidental injury within the statute. In my opinion the decision of the learned county court judge was quite right and this appeal must be dismissed.

(1) [1908] A. C. 437, 439. (2) [1903] A. C. 443.
(3) (1902) 5 F. 120.

C. A. 1909

HUGHES v. CLOVER, CLAYTON & CO., LIMITED.

FARWELL L.J. I agree.

KENNEDY L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Barlow, Barlow & Lyde, for J. H. Glover, Liverpool.*

Solicitors for respondent: *Helder, Roberts & Co., for John Behn, Liverpool.*

H. B. H.

C. A. 1909 *July* 21.

[IN THE COURT OF APPEAL.]

DEVITT *v.* OWNERS OF STEAMSHIP BAINBRIDGE.

Employer and Workman—Examination of Workman by Medical Practitioner—Employer's Right—Condition—Workman requiring Presence of his own Medical Man—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clause* 14.

A medical man, instructed by the employers, asked a workman in receipt of weekly payments under the Workmen's Compensation Act to submit himself to examination. The man answered that he had no objection provided his own medical man was present:—

Held, that he had not refused to submit himself to examination within the meaning of the Act.

IN this case an award had been made by the county court judge on November 18, 1908, ordering the appellants, who were shipowners, to pay 8*s.* a week to the respondent by way of compensation for injuries received by an accident in the course of his employment. On May 28, 1909, a medical man instructed by the appellants called on the respondent and told him that he had come to examine him on behalf of the owners. The man answered that he had no objection provided his own medical man was present. The medical man took this to be a refusal to be examined unless his own medical man was present, and left him. The owners applied to the county court judge for an order suspending payment of the weekly allowance under clause 14 of Sched. I. of the Act of 1906. (1) The judge held that the

(1) Workmen's Compensation Act, 1906, Sched. I., clause 14: "Any workman receiving weekly payments under this Act shall, if so required

workman had not "refused" within the meaning of the section and dismissed the application.

The employers appealed.

A. Nielson, for the appellants. The applicant made it a condition of submitting himself to examination that his own doctor should be present. The right of the employer to have the workman examined is absolute, and neither the workman nor the county court judge has any power to impose any condition: *Osborn* v. *Vickers, Sons & Maxim.* (1) It is true that in that case the judge ordered the employer to pay for the attendance of the workman's own doctor, but in practice, if the workmen are allowed to insist on the presence of doctors of their own, the employers will have to pay them.

Shakespeare, for the respondent, was not called upon.

COZENS-HARDY M.R. The only question we have to decide is whether the workman has refused to submit himself for examination by a duly qualified medical practitioner, provided and paid by his employers, within the meaning of clause 14 of the First Schedule to the Workmen's Compensation Act, 1906. What happened was this. The medical practitioner provided by the employers called on the workman, who said that he had no objection to being examined, provided that his own medical man was allowed to be present at the examination. Is it possible for us to say that by so doing he "refuses to submit himself to such an examination"? It was, on the contrary, an expression of the workman's willingness to submit to the examination, only adding a stipulation which the county court judge had full power to decide was a reasonable one, and he thought it was reasonable. The workman said "I have no objection to being examined, but only wait until my own medical man is able to attend the

---

by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

(1) [1900] 2 Q. B. 91.

C. A. 1909

DEVITT v. OWNERS OF STEAMSHIP BAINBRIDGE.

examination." The learned county court judge thought that that was not a refusal to submit to the examination as required by the employers, and I agree with the view he took. The appeal must be dismissed with costs.

FARWELL and KENNEDY L.JJ. agreed.

Appeal dismissed.

Solicitors: *Botterell & Roche, for Botterell & Roche, Sunderland; Woodhouse & Davidson, for Burnicle & Morton, Sunderland.*

J. R. B.

C. A. 1909 *July* 22.

[IN THE COURT OF APPEAL.]

BRICE *v.* EDWARD LLOYD, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed at certain works climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank and was scalded to death. The workmen were not allowed on the tank:—

Held, that the accident did not arise "out of the employment" within the meaning of the Workmen's Compensation Act, 1906, and that compensation was not recoverable under that Act.

THIS was an appeal from an award of the county court judge of Sittingbourne sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the illegitimate child of George Brice, a general labourer in the employment of Edward Lloyd, Limited.

The facts found by the county court judge were as follows. On the night of November 20, 1908, Brice was on shift duty, engaged in cleaning cylinders. There was a tank in the same building, about 156 yards from the room in which he was working and in another room above it, called the pump room. The tank was raised 5½ ft. from the floor, and to get to the top of it a platform was erected, the top of the tank being 2½ ft.

higher than the platform. There was an aperture in the tank about 23 inches wide to enable the chief engineer to examine the interior and take the temperature of the water. Only the chief engineer and the chief stoker were authorized to deal with the tank in any way. It would have been the foreman's duty to report to the chief engineer the name of any workman who had climbed on to the tank; and the chief engineer deposed that he would have dismissed any person so reported. At 277 yards from the room in which the deceased was at work the company had provided a well lighted and well warmed dining room, which was kept open for the use of the workmen night as well as day. Though many of the workmen used this dining room it was not obligatory on them to do so, and several did not. Those employed on night shifts took their meals when and how they could. On the night in question Brice and others working with him went to the pump room on account of its warmth and had their suppers on top of the tank. When Brice had finished his supper he said he was going back to his work. He got up, walked to the end of the tank, fell into it through the aperture, and thereby sustained injuries resulting in his death.

The learned judge held, upon the authority of *Blovelt* v. *Sawyer* (1), that an accident to a man whilst eating a meal on the premises where he was employed was an accident arising out of and in the course of his employment, and that it did not cease to be so when the particular place chosen for his meal was one where he had no business to be. In his opinion so to hold would be to bring back by a side wind the disqualification of serious and wilful misconduct which under the existing Act in the case of death was no bar to relief. He therefore made an award in favour of the applicant.

The employers appealed.

Frampton, for the employers. This was not an accident arising out of the employment, inasmuch as the risk of the accident was not a risk reasonably incidental to the employment. A workman is not entitled to create risks to which his employment does not expose him. This hot water tank was a dangerous

(1) [1904] 1 K. B. 271.

C. A. 1909

BRICE v. EDWARD LLOYD, LIMITED.

place where the deceased had no business at all. He had no more right to take his meals on the top of this tank than he would have had in hot weather to take them on the top of the roof. This case falls within the principle of *Smith* v. *Lancashire and Yorkshire Ry. Co.* (1) and *Reed* v. *Great Western Ry. Co.* (2)

Blovelt v. *Sawyer* (3), on which the county court judge proceeded, is distinguishable because there the man was taking his meal in the place which to the knowledge of the employers was usually resorted to by the workmen for that purpose, and the same ground of distinction applies to *Gane* v. *Norton Hill Colliery Co.* (4) The county court judge misapprehended the issue, which was not whether the deceased was guilty of misconduct, but whether the accident arose out of the employment.

R. F. Gibson, for the applicant. This was a reasonable act in the circumstances; there was no obvious danger, and the men were under no obligation to go to the dining room provided by the employers, but had a discretion as to the place where they would take their meals. There was no prohibition against using this tank. *Morris* v. *Mayor of Lambeth* (5) and *Blovelt* v. *Sawyer* (3) apply. In *Reed* v. *Great Western Ry. Co.* (2) the man was neglecting his duty by leaving his engine, and in *Smith* v. *Lancashire and Yorkshire Ry. Co.* (6) the man was riding on the foot-board after his work was over. Here the deceased never ceased to be in the employment, and the accident arose out of and in the course of that employment.

Frampton, in reply, cited *Craske* v. *Wigan*. (7)

COZENS-HARDY M.R. This case has been argued very briefly and very ably on both sides, but, having listened with attention to the arguments, I am driven to the conclusion that the decision of the county court judge cannot be supported. There is no dispute about the facts; the only question is as to the proper inference to be drawn from the facts. In my opinion the proper inference is that though this accident arose in the course of the

(1) [1899] 1 Q. B. 141.
(2) [1909] A. C. 31.
(3) [1904] 1 K. B. 271.
(4) Ante, p. 539.
(5) (1905) 22 Times L. R. 22.
(6) [1899] 1 Q. B. 141.
(7) Ante, p. 635.

employment it did not arise out of the employment. It has been decided more than once that a man may claim compensation for an accident which takes place at a time when he is not actually at work, and the case of *Blovelt* v. *Sawyer* (1) is a good illustration of that proposition. But I venture to think it does not at all justify the wide proposition which the county court judge thought it decided. In that case the workman was a bricklayer employed at the works of the respondents at so much an hour, but the men were permitted, with the knowledge of the employers and their foreman, to do that which is almost inevitably done in such cases—they might stay on the employers' premises to get their meals or go elsewhere for them. The applicant sat down by the side of a wall on the respondent's premises to eat his dinner, and the wall fell and injured him. It was in fact an implied term of the contract that these workmen might get their meals under this wall, and what has been called the nexus between the employer and the workman was not thereby dissolved. At the time when that case was decided the accident had to arise on, in, or about the premises as well as out of and in the course of the employment. The accident did arise on the premises, and the only question was, Did it arise out of the employment? The Court held that the man was entitled to compensation. I will quote a short passage from my own judgment in that case because it indicates what is now my view. I then said: "I gather, however, from the admissions that there was a contract by which the applicant was to be paid at the rate of so much an hour for the time that he was actually at work, and that it was a term of the contract that the dinner hour might be spent either on or off the premises. If it had been part of the contract, as it is in some employments, that the dinner hour should be taken on the premises, there could not have been a doubt that an accident occurring during the dinner would have occurred in the course of the employment, because by the contract the workmen would be bound to be on the premises. In my view it can make no difference if the fact is that by the terms of the particular engagement the workman was to have the right, if so minded, to get his dinner on the employer's premises." It

(1) [1904] 1 K. B. 271.

C. A. 1909

BRICE v. EDWARD LLOYD, LIMITED.

Cozens-Hardy M.R.

would be entirely to misunderstand that decision if it were held to mean that a workman under those circumstances is at liberty to get his meals on any portion of the employer's premises, however dangerous or unsafe it may be. There is nothing in that case which could in any way justify such a contention. Precisely the same remark applies to *Morris* v. *Mayor of Lambeth* (1), where the accident happened, not in the shelter provided for the workmen, but in a shanty where it was usual for the men to take their meals. That being the usual and accustomed place where the men on night duty took their food, it was held to be irrelevant to say that the employer had provided another place where the men could get their meals. So here I attach no importance to the fact that another place had been provided where the men might get their meals if they were not bound to get their meals there. But it is another and a much longer step to hold that, though they were not bound to get their meals in the room provided for them, they were at liberty to get their meals, say, in hot weather, as it was put in argument, on the top of the roof, or in cold weather on the top of this hot water tank, getting there by means which imposed on those who ventured on such an excursion a considerable risk. Now the evidence is that the officials were not aware that any man ever had taken this venturesome step. Let me describe what it was. The deceased man and a fellow workman went into the room where the tank was and stepped on to a platform by which the tank was approached. Then they had to climb two and a half feet to reach the top of the tank, and then there was an opening of twenty-two inches. The man got on to the tank and took his meal, and in coming back he failed to regain the platform. In these circumstances it seems to me that this was not an accident arising out of the employment. The question of serious and wilful misconduct does not arise at all. If it had been an accident arising out of the employment, then gross negligence on the part of the deceased workman would have been no answer to the claim for compensation. But that is not the question. The question which the Court has to consider in the present

(1) 22 Times L. R. 22.

case is whether the deceased was acting within any authority which he had—whether in fact he was not needlessly exposing himself to a risk which could not be fairly said to arise out of the employment. In my opinion the decision of the learned county court judge was wrong and this appeal must be allowed.

FARWELL L.J. I agree. It is now well settled that the word "employment" in the Act is not to be confined to actual work. In my opinion it extends to all things which the workman is entitled by the contract of employment expressly or impliedly to do. Thus he is entitled to pass to and from the premises and to take his meals on the premises. But he is not entitled, and therefore he is not employed, to do things which are unreasonable or things which are expressly forbidden. In *Morris* v. *Mayor of Lambeth* (1) (the shanty case) Collins M.R. said that "no prohibition had ever been addressed to the applicant against making use of the shanty. In the absence of such prohibition all the evidence seemed one way. He thought the applicant was none the less in the exercise of his duties because he was cooking a chop in the shanty. The nexus between the applicant and his employers had not been destroyed." That, of course, is the converse case to this. In the present case, this place being a dangerous place was obviously forbidden to the men, not in the sense of express prohibition, but in the sense that it would not occur to any one that it would be allowed. The chief engineer stated that he would have dismissed any person reported to him as having climbed on to the tank. In the face of that evidence it seems to me impossible to say that this accident arose out of and in the course of the employment.

Take the case of *Gane* v. *Norton Hill Colliery Co.* (2) There Mr. Simon in the course of his argument put the case of a swing bridge which the workmen were in the habit of using as a way out of the works; it would surely be impossible to say that a workman was entitled to jump across when the bridge was open for the passage of boats, because that would not be a reasonable user of the way, and such a user would not be in the course of his employment. Here the workman was not entitled

(1) 22 Times L. R. 22. (2) Ante, p. 539.

C. A. 1909

BRICE v. EDWARD LLOYD, LIMITED.

Farwell L.J.

to go to this place at all. Supposing a workman is forbidden to use a particular place, the Act says that, in the case of death, misconduct does not disentitle him from claiming compensation; but it is quite another thing when you have to prove that the accident arose out of and in the course of the employment. If a workman chooses a dangerous place such as this tank to get his meals and meets with an accident, in my opinion it is impossible to say that the accident arose out of the employment.

KENNEDY L.J. I am of the same opinion. The question is whether the accident which caused the death of this man was an accident arising out of his employment. As was pointed out by the Master of the Rolls in *Challis* v. *London and South-Western Ry. Co.* (1), the test is whether the risk of the accident is one which may reasonably be looked upon as incidental to the employment. Can the risk in this case be so treated? No one disputes that the period of employment is not necessarily broken by an interval of leisure used for the consumption of food. There being nothing further, if an accident happened during that interval, as, for example, if a workman was taking his meal by the side of a wall on the premises and the wall fell upon him, there would be no break in the employment. But where, as here, a man chooses to go to a dangerous place where he has no business to go, incurring a danger of his own choosing and one altogether outside any reasonable exercise of his employment, in my opinion, if he meets with an accident, it cannot be said that the accident arose out of his employment.

Appeal allowed.

Solicitors for appellants: *Sismey & Cook, for Arnold, Baker & Day, Rochester.*

Solicitors for respondent: *M. & D. Blome-Jones, Sheerness.*

(1) [1905] 2 K. B. 154.

H. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1909
July 9, 22.

CHISLETT *v.* MACBETH & CO.

Master and Servant—Compensation—"Seaman"—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 13—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

In interpreting the Employers' Liability Act, 1880, which excludes seamen from its operation, the term "seaman" ought not to be defined by reference to the definition in the Merchant Shipping Act, 1854, but must bear its ordinary meaning.

Dictum of Lord Alverstone C.J. in *Corbett* v. *Pearce*, [1904] 2 K. B. 422, overruled.

The plaintiff was employed with other men by the defendants, the owners of a steamship, in warping the vessel from one berth to another across a large dock connected with a tidal river. He was not a member of the crew of the vessel. Whilst engaged in unmooring the vessel from the side of the dock where she was then lying and passing ropes to a tug and to the quay alongside which she was to be moored he sustained personal injuries. The vessel was taken across by means of the tug and a rope and was during this operation at no moment entirely free from a quay. She was not using her own steam or any motive power of her own.

In an action brought by the plaintiff under the Employers' Liability Act, 1880, against the defendants to recover damages for the personal injuries sustained by him whilst in their employment:—

Held, that he was not a "seaman" and was consequently not excluded from the operation of the Act.

Appeal from a decision of the Divisional Court (Bigham and Walton JJ.). (1)

The action was brought in the Liverpool County Court by a man who was employed as a "rigger" on board a steamship in dock to recover damages against his employers under the Employers' Liability Act, 1880, for personal injuries sustained by him while in their employment. The question was whether the plaintiff was a "seaman" so as to be excluded from the benefits of that Act. (2)

(1) Ante, p. 36.

(2) Employers' Liability Act, 1880, s. 8: "For the purpose of this Act, unless the context otherwise requires —The expression 'workman' means . . . . any person to whom the Employers and Workmen Act, 1875, applies."

Employers and Workmen Act, 1875, s. 13: "This Act shall not

C. A. 1909

CHISLETT v. MACBETH & Co.

The plaintiff was engaged in warping the vessel, which was owned by the defendants, from one berth to another across the Langton Dock, which is one of the largest docks in Liverpool and is connected with a tidal river. He was one of five hands who were so engaged upon the deck of the vessel. The duty in which he was engaged at the time he was injured consisted in unmooring the vessel from the side of the dock where she was then lying and passing ropes to a tug and to the quay alongside which the vessel was to be moored. The vessel was taken across by means of the tug and a rope and was during the operation at no moment entirely free from a quay. She was not using her own steam or any motive power of her own. The plaintiff was not a member of the crew. The plaintiff and the other hands, though employed by the defendants, were paid by a master rigger, their rate of remuneration being 3*s.* 6*d.* per tide.

The jury having assessed the damages at 50*l.*, the county court judge held that the plaintiff was not a "seaman" and was therefore not excluded from the operation of the Employers' Liability Act, 1880, upon the ground that the definition in s. 2 of the Merchant Shipping Act, 1854, does not apply to casual and temporary employment in work of the character of that in which the plaintiff was engaged at a time when the vessel was not moored in a self-navigating manner, but was being dragged by external power over artificial water. He accordingly entered judgment for the plaintiff for 50*l.*

The defendants having appealed, the Divisional Court held, on the authority of *Corbett* v. *Pearce* (1), that in interpreting the Employers' Liability Act, 1880, the word "seaman" must be construed by reference to the definition in the Merchant Shipping

apply to seamen or to apprentices to the sea service."

Merchant Seamen (Payment of Wages and Rating) Act, 1880 (43 & 44 Vict. c. 16), s. 11: "The thirteenth section of the Employers and Workmen Act, 1875, shall be repealed in so far as it operates to exclude seamen and apprentices to the sea service from the said Act, and the said Act shall apply to seamen and apprentices to the sea service accordingly; but such repeal shall not, in the absence of any enactment to the contrary, extend to or affect any provision contained in any other Act of Parliament passed, or to be passed, whereby workman is defined by reference to the persons to whom the Employers and Workmen Act, 1875, applies."

(1) [1904] 2 K. B. 422.

Act, 1854, and that the plaintiff was a seaman within that definition and was therefore excluded from the benefit of the Act of 1880.

The plaintiff appealed.

Hanbury Aggs, for the appellant. In considering whether a man is a seaman or not regard must be had to the nature of the contract of service, and the test is whether he has contracted to expose himself to the risks of the sea. In *Corbett* v. *Pearce* (1), upon which the Divisional Court founded their decision in this case, the man was a seaman on any definition of the word, and therefore it was not necessary to read into the Employers' Liability Act, 1880, the definition given in the Merchant Shipping Act, 1854, and in so far as *Corbett* v. *Pearce* (1) proceeded upon that view it is directly contrary to the view of the Scottish Court of Session in *Oakes* v. *Monkland Iron Co., Ld.* (2) Moreover, the definition in s. 2 of the Merchant Shipping Act, 1854 (which is re-enacted by the Merchant Shipping Act, 1894, s. 742), is not a definition at all in any proper sense. Sect. 2 says "'seaman' shall *include* every person" (subject to certain exceptions which do not apply) "employed or engaged in any capacity on board any ship." That implies that you must first get a person who has entered into a contract to engage in maritime risks. The form of that definition is probably accounted for by a dictum of Coleridge J. in *Wilson* v. *Zulueta* (3), which was decided a few years before the passing of the Act, that for the purposes of the exemption in the schedule to the Stamp Act, 55 Geo. 3, c. 184, firemen and stokers were not seamen, but were labourers or artificers. The provisions of the Act of 1854 do not apply to men employed for a short time and not intended to be hired for any maritime service: see ss. 141, 167. According to the definition in the Century Dictionary a seaman is "a man whose occupation it is to co-operate in the navigation of a ship at sea."

[COZENS-HARDY M.R. referred to *Reg.* v. *Judge of City of London Court and Owners of Steamship Michigan.* (4)]

(1) [1904] 2 K. B. 422.
(2) (1884) 11 R. 579.
(3) (1849) 19 L. J. (Q.B.) 49.
(4) (1890) 25 Q. B. D. 339.

C. A. 1909

CHISLETT v. MACBETH & Co.

No doubt a man does not necessarily cease to be a seaman because the ship may not be at sea at the time, and per contra the mere putting a man on deck does not constitute him a seaman. In that case it was an implied term of the contract that the man was going to be employed for another voyage, and the judgment of Lord Coleridge assists the appellant, because he clearly intimates that the definition in the Merchant Shipping Act ought not to be imported into other Acts unless expressly incorporated. Moreover, that was a decision as to the right of a man to recover his wages in rem, and rather different considerations apply to a case where the question is whether a man is to be excluded from the benefit of an Act passed for his relief. Lord Coleridge there suggested that the definition in the Merchant Shipping Act, 1854, was wide enough to include a stevedore who, it was conceded, would not be entitled to a maritime lien because he is not a seaman in the ordinary sense of the word, and there are many cases in which a stevedore has recovered compensation under the Employers' Liability Act, 1880, and under the Workmen's Compensation Acts. If the plaintiff is excluded from the benefit of the Employers' Liability Act he would not be entitled to relief as a seaman under the Workmen's Compensation Act, 1906, because that Act limits seamen to members of the crew. Lord Halsbury's judgment in *Raine* v. *Jobson* (1) shews that not every one who does work upon a ship is a seaman, but that the nature of the work must be considered, and in *In re Great Eastern Steamship Co.* (2) Chitty J. lays stress on the fact that the claimant there was engaged for a voyage and not upon a temporary job; and see *The Jane and Matilda.* (3) No man has ever been held to be a seaman unless he was a member of the crew or was engaged for a voyage, although if he was engaged for a voyage it is immaterial that the voyage might never have taken place: *Wells* v. *Osman.* (4) So it has been held that a ship's husband is not a seaman: *The Ruby* (No. 2). (5)

A. Hyslop Maxwell, for the respondents. The moving of ships

(1) [1901] A. C. 404, 409.
(2) (1885) 5 Asp. M. C. 511.
(3) (1823) 1 Hagg. Adm. 187.
(4) (1704) 2 Ld. Raym. 1044.
(5) [1898] P. 59.

about a dock requires the work of a good seaman, and whether you take the definition in the Merchant Shipping Act, 1854, or take the general definition, this plaintiff, from the nature of the work he was doing and from the particular facts of the case, was a seaman. In *The Ruby* (No. 2) (1) Sir Francis Jeune in discussing the meaning of the word "seaman" takes the test to be whether the work is such work as is required to be done on board ship. Applying that test to the present case, this man was a seaman.

Hanbury Aggs, in reply.

Cur. adv. vult.

July 22. FARWELL L.J. In this case the Divisional Court have proceeded on the assumption that *Corbett* v. *Pearce* (2) decided that "seaman" in the Employers' Liability Act, 1880, is defined by the Merchant Shipping Act, 1854. I am unable to agree with this. It is true that the Lord Chief Justice in that case expressed his opinion that this is so, but neither of the two other members of the Court founded his judgment entirely on or accepted that opinion, and I am unable to agree with it. It is contrary to the decision of the Scottish Court in *Oakes* v. *Monkland Iron Co.* (3), and on a question of this sort it is desirable that the decisions in the Scottish Court and in the Courts of this country should, if possible, be uniform. Further, it is to be observed that the definition of seaman under the Act of 1854 is not a true definition at all. That Act says "including," not "means," and I know of no principle which warrants the Court in assuming that such a phrase, or even a definition proper, in one Act is to be read into another. Draftsmen of Acts of Parliament are only too ready to avail themselves of the pernicious practice of legislating by express reference to another Act. I should be sorry to give any encouragement to the view that such reference may be implied. It is bad draftsmanship enough to refer expressly; it would be far worse to refer by implication. I think that "seaman" in the Act of 1880 must bear its ordinary signification, and, without attempting to define it, it is sufficient to say that I agree with

(1) [1898] P. 59. (2) [1904] 2 K. B. 422.
(3) 11 R. 579.

C. A. 1909

CHISLETT v. MACBETH & Co.

the county court judge that a man employed "in a casual and temporary employment of this character when the vessel was not employed in a self-navigating manner, but was being dragged by external power over an artificial water," is not a seaman within the Act of 1880.

KENNEDY L.J. The question on this appeal is whether the plaintiff, suing under the Employers' Liability Act, 1880, was or was not at the time of his injury a seaman within the meaning of the Employers and Workmen Act, 1875, s. 13, and therefore, according to the provisions of s. 8 of the former Act, not a "workman" to whom that former Act applies.

Both the learned county court judge who tried this case at Liverpool and the Divisional Court have considered this question by the light of s. 2 of the Merchant Shipping Act, 1854, which has been re-enacted in s. 742 of the Merchant Shipping Act, 1894. But the two Courts have differed in their conclusion. The county court has held that the circumstances of the plaintiff's employment did not bring him within the inclusive description of "seaman" given in the 2nd section of the Merchant Shipping Act, 1854. The Divisional Court has held that they did and has reversed the decision of the inferior Court.

Now I am of opinion that we ought not in deciding whether the plaintiff was or was not a "seaman" under the Employers and Workmen Act, 1875, s. 3, to have recourse to the description of "seaman" given in s. 2 of the Merchant Shipping Act, 1854, as the test. That section gives a description (I say description rather than definition, for the words used are "shall include") of "seaman" for the purposes of that particular statute and not generally for the purposes of other statutes; and the Employers and Workmen Act, 1875, does not, either by express enactment or by reference, incorporate that description. Both the learned judges in the Divisional Court, according to the report of their judgments in the *Law Reports* (1), appear to have held themselves bound by an earlier decision of the Divisional Court in *Corbett* v. *Pearce* (2) to look to the Merchant Shipping

(1) Ante, pp. 39, 40. (2) [1904] 2 K. B. 422.

Act, 1854, s. 2, for the definition of "seaman" in the Employers and Workmen Act, 1875, and, having done so, they have decided that the plaintiff was a "seaman" within the language of that section.

Now I have no doubt that the decision of the Divisional Court (of which I was myself a member) in *Corbett* v. *Pearce* (1) was right upon the facts of the case, but, sitting here, I should feel myself bound to say that, if and so far as its reasoning depended upon a view that the word "seaman" in the Employers and Workmen Act, 1875, s. 13, must be interpreted by the description of "seaman" in the Merchant Shipping Act, 1854, s. 2, that reasoning ought not to be treated as correct. It is not, I think, permissible to interpret a term used in statute A by a definition or description found in another independent statute B, but there confined to the purposes of that statute, and not either by incorporation or reference made part of statute A: cf. per Lord Coleridge C.J. in *Reg.* v. *Judge of City of London Court and Owners of Steamship Michigan.* (2) I cannot help thinking, with sincere respect, that the judges who decided the present case in the Divisional Court were probably misled by the first words of the head-note to the report of *Corbett* v. *Pearce.* (1) On reference to the report itself it will clearly be seen that whilst Lord Alverstone C.J. (3) is reported as saying that in construing s. 13 of the Employers and Workmen Act, 1875, we must seek the definition of the term "seaman" in the Merchant Shipping Act, 1854, Wills J. was indeed of opinion that it was reasonable to turn to the Merchant Shipping Act, 1854, to ascertain who were the persons intended to be excluded from the benefit of the Employers and Workmen Act, 1875, but expressly held that "whether we refer to the Merchant Shipping Act as the test of what a 'seaman' is, or whether we deal with the matter apart from that Act, the man was a seaman"; and in my judgment the Merchant Shipping Act definition of a seaman is not cited at all, but the matter is dealt with upon the consideration of the nature of the services which the plaintiff in that case rendered in the navigation of a vessel which was

(1) [1904] 2 K. B. 422. (2) 25 Q. B. D. 339, at p. 342.
(3) [1904] 2 K. B. 422, at p. 425.

C. A. 1909

CHISLETT v. MACBETH & Co.

Kennedy L.J.

undoubtedly, in my view, a "ship" navigating the estuary of the Thames. In my view *Corbett* v. *Pearce* (1) ought not to be regarded as a judicial authority that for the meaning of the term "seaman" in s. 13 of the Employers and Workmen Act, 1875, we must refer to s. 2 of the Merchant Shipping Act, 1854.

Turning, now, to the facts of the present case, I think that the decision of the learned county court judge was right, and was put by him upon right grounds. In judging whether this "rigger" was or was not a "seaman" within the meaning of the Employers and Workmen Act, 1875, all the circumstances must be considered together, as the learned county court judge has considered them. They are stated in page 37 of the report. I lay stress upon the word "together," for I agree with the learned counsel for the respondents that the mere fact that the vessel was in a dock, or that the employment was temporary, or that the vessel was not being moved by her own steam power, taken singly and apart, might be compatible with employment as a "seaman" within the meaning of the statute in question. But when, in the case of a man who is not pursuing the avocation of a sailor and not serving in any capacity as a member of a ship's crew, one finds a conjunction of all the circumstances I have mentioned, it appears to me that the man cannot be treated as a "seaman" within the meaning of the statute, if the word be interpreted, as I think it should be, in the language of Wills J. in *Corbett* v. *Pearce* (1), according to its natural and ordinary signification. It is no answer to say that this rigger was doing work which, if he had been a member of the ship's crew, he might properly have been required to do in the ordinary course of a seaman's duty. Knotting a cable or lowering a bale of goods into the ship's hold are acts within the course of such duty: indeed there are really few manual acts on board ship that are not. I will only add that, even if the description of "seaman" in the Merchant Shipping Act, 1854, s. 2, were taken as the test, I should not be inclined to come to a different conclusion in the circumstances of the present case. The wide words "Every person employed or engaged in any capacity on board any ship," as Lord Coleridge C.J. indicated in *Reg.* v. *Judge of City of*

(1) [1904] 2 K. B. 422.

London Court and Owners of Steamship Michigan (1), and as my brother Bigham expressly pointed out in the present case, must probably be read with some limitation. If read in the fullest possible sense they would make a "seaman" of every carpenter, painter, boiler-maker, or other manual labourer temporarily employed as such by the owners to do a job upon a ship anywhere, whether in dock or afloat, or, indeed, even a doctor sent on board to tend a sick seaman—a result manifestly unreasonable. As at present advised, I should take the description to refer to a person who is engaged or employed on board a ship as a member, temporary or permanent, of the ship's crew. In my opinion this appeal should be allowed.

COZENS-HARDY M.R. I agree. The appellant will have the costs of the Divisional Court and this Court.

Appeal allowed.

Solicitors: *Milner & Bickford, for Edward Lloyd, Liverpool; Walker, Son & Field, for Weightman, Pedder & Co., Liverpool.*

(1) 25 Q. B. D. 339, at p. 342.

H. B. H.

Distinguished. CASSIDY *v.* MINISTRY OF HEALTH. [1951] 1 All E.R. 574.

Considered. CASSIDY *v.* MINISTRY OF HEALTH [1951] 2 K. B. 343

C. A.

1909

July 12, 13, 23.

[IN THE COURT OF APPEAL.]

HILLYER *v.* THE GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

Negligence—Public Hospital—Liability of Governors—Operation—Injury to Patient—Hospital Staff—Relation of Hospital to Patients.

The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The relationship of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities.

The plaintiff brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff:—

Held, that the action was not maintainable.

APPEAL from a verdict and judgment at a trial before Grantham J. and a special jury which raised the question of the liability of the governors of a hospital for negligence in the treatment of a patient.

The action was brought by William Herbert Hillyer, a medical man, against "The Mayor, Commonalty, and Citizens of the City of London (Governors of the House of the Poor commonly called St. Bartholomew's Hospital, near West Smithfield, of the Foundation of King Henry the Eighth)," for damages for injuries from the defendants' negligence at their hospital.

The plaintiff's case was that on March 28, 1907, he entered St. Bartholomew's Hospital for the purpose of being medically examined under an anæsthetic; that the examination was conducted by Mr. Charles Barrett Lockwood, a consulting surgeon attached to the hospital; that for the purpose of the examination he was placed on an operating table in such a position that his arms were allowed to hang over its sides; that his left arm was in contact with a hot water tin projecting from beneath the table, and the inner upper part of it was burned, and that the

inner upper part of his right arm was bruised by the operator or some other person pressing against it during the operation; and that the result of these injuries was traumatic neuritis and paralysis of both arms, and he had ever since been unable to exercise his profession as a medical man. It appeared that the examination was undertaken gratuitously, as the result of representations made by the plaintiff that after prolonged suffering from and treatment for sciatica he had come to the end of his resources. The defendants denied the alleged negligence and pleaded that if they owed any duty to the plaintiff it was to exercise reasonable care in the selection of the hospital staff, in which duty they had not failed.

The plaintiff called none of the persons present at the operation as witnesses, and his case was mainly based on the defendants' answers to interrogatories, the material ones being Nos. 5 and 6, which were as follows:

5. "That the persons who in the ordinary course of their employment are servants or agents of the defendants and who assisted in the operation and placing the plaintiff upon the operating table and in administering an anæsthetic to the plaintiff and in securing the plaintiff in position on the operating table and in conducting the examination of the plaintiff were the following." Three surgeons, an administrator of anæsthetics, and three certificated nurses were then named; then "two of the hospital staff known as box carriers and attached to the theatre, whose duty was to bring the plaintiff to the theatre and place him upon the operating table. As regards the part which the above persons took in the examination of the plaintiff in the present case their respective duties were as follows:—(*a*) The plaintiff was placed upon the operating table by the box carriers. (*b*) The acting sister had to see that he was placed properly on the table, and that the part prepared for examination was uncovered, while the rest of his body was warmly and adequately covered. She had to stand at the side of the surgeon and hand him such things as he might from time to time require. (*c*) The examination of the plaintiff was carried out by the said Charles Barrett Lockwood, assisted by the said George Ernest Gask and the said James Ernest Helme Roberts. (*d*) The house surgeon,

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

with the assistance of the nurses present, had to make such alterations in the position of the plaintiff upon the operating table as the operator demanded. (*e*) The said George Herbert Colt was responsible for the due administration of the necessary anæsthetic. (*f*) The said nurses present had further to comply with the directions of the surgeons in charge as to the requirements of the moment during the course of the examination."

"6. That the plaintiff in the course of the said examination was burned on the left arm by the displacement of a hot water can in the course of undergoing the said examination under an anæsthetic."

Grantham J. refused to put the question of negligence to the jury, holding that, even if there had been negligence, the operation was under the control of the operating surgeon, for whose action it was admitted that the governors were not responsible; neither would they be liable for the negligence of their staff, even if proved, and he therefore gave judgment for the defendants.

The plaintiff appealed.

J. B. Matthews, for the appellant. The refusal of the judge in the Court below to leave the case to the jury is sufficient ground for a new trial. If the jury were satisfied that the injury to the plaintiff was caused by some negligence on the part of the hospital staff, then the defendants are liable for the negligence of their staff. For the purposes of this appeal it is admitted that the position of master and servant did not exist between the operating surgeon and the defendants, but the position of the staff is different. The answer to interrogatory 6 admits the plaintiff's case; indeed it is a case of res ipsa loquitur, for the plaintiff's arm was not injured before the operation. There must have been negligence on the part of some of those present at the operation, and unless the defendants can make out as a matter of law that they are not responsible for the negligence of some member of their staff, the plaintiff is entitled to a new trial and to have the question of negligence submitted to a jury.

The plaintiff, being under an anæsthetic at the time, can give

no evidence, but the injured arm is prima facie evidence of negligence within *Scott* v. *London Dock Co.* (1), *Christie* v. *Griggs* (2), and *Skinner* v. *London, Brighton, and South Coast Ry. Co.* (3) Where an inanimate patient, handled by eight people, meets with an injury, the injury is prima facie evidence against them all; all are jointly and severally liable for the negligence, and it is no excuse for the master of these eight people to say that the operating surgeon is responsible for the conduct of the operation and therefore they are not liable. The duty of keeping the patient safely on the operating table was on the hospital staff who were present at the operation.

The cases which induced the judge to withdraw this action from the jury are *Hall* v. *Lees* (4), *Evans* v. *Liverpool Corporation* (5), and *McDonald* v. *Massachusetts General Hospital.* (6) But *Hall* v. *Lees* (4) turned entirely on the question whether the nurses were the servants of the association; and *Evans* v. *Liverpool Corporation* (5), though an authority that the operating surgeon is not liable, does not deal with the liability of the rest of the staff. The position of the surgeons and physicians is well stated in *Glavin* v. *Rhode Island Hospital.* (7) [Beven's Negligence in Law, 3rd ed. p. 1165, was also cited.] That the defendants are liable for the negligence of their servants is clear: *Foreman* v. *Mayor of Canterbury.* (8)

McCall, K.C., *Norman Craig, K.C.*, and *H. Marks*, for the respondents. This case is clearly covered by *Evans* v. *Liverpool Corporation.* (5) No distinction can be made between the operating surgeon, the house surgeons, and the nurses, for the latter are not the servants of the defendants for the purposes of an operation conducted by the medical staff. A hospital which has exercised due care in the selection of its agents is not liable for injury caused to a patient by their negligence: *McDonald* v. *Massachusetts General Hospital* (6); *Glavin* v. *Rhode Island Hospital* (9); *District of Auckland Hospital* v. *Lovett.* (10) The

(1) (1865) 3 H. & C. 596.
(2) (1809) 2 Camp. 79.
(3) (1850) 5 Ex. 787.
(4) [1904] 2 K. B. 602.
(5) [1906] 1 K. B. 160.
(6) (1876) 21 Amer. Rep. 529.
(7) (1879) 34 Amer. Rep. 675.
(8) (1871) L. R. 6 Q. B. 214.
(9) 34 Amer. Rep. 675, 679.
(10) (1892) 10 N. Z. L. R. 597.

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

plaintiff has not attempted to shew that the defendants have not used due care and skill in selecting their medical and nursing staff, the only duty undertaken by a public hospital towards their patient.

Matthews in reply.

Cur. adv. vult.

July 23. COZENS-HARDY M.R. I think the decision in this case is quite right, and the appeal must be dismissed for the reasons contained in the judgments of Farwell L.J. and Kennedy L.J., which I have read.

FARWELL L.J. read the following judgment:—In March, 1907, the plaintiff, who is a medical man and had recently returned from West Africa in a bad state of health and without means, consulted Mr. Lockwood and by his advice entered St. Bartholomew's Hospital as a non-paying patient for the purpose of being examined by Mr. Lockwood, who was a consulting surgeon attached to the hospital. He was taken to the theatre in due course and placed under anæsthetics; when he recovered consciousness he found that one arm had been bruised and the other burned on the inner upper part. Such bruising and burning were consistent with his right arm having been pressed against the edge of the operating table and with his left arm having been allowed to hang down and come in contact with the heating apparatus under the table, but there was no evidence that this was the case; the plaintiff himself was unconscious, and he called none of the persons who were present at the operation. His only direct evidence was the answer of the defendants to the sixth interrogatory, "that the plaintiff in the course of the said examination was burned on the left arm by the displacement of a hot water can in the course of undergoing the said examination under anæsthetics."

The persons who were present at this examination and their duties are set out in the answer to interrogatory 5. [His Lordship read this, and continued:—] The plaintiff now sues the defendants, who are governors of the hospital under certain agreements and statutes, for damages for negligence. Grantham J. held that if there was negligence they were not liable, and also

withdrew the case from the jury on the ground that there was no evidence of negligence.

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

Farwell L.J.

It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be liable under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital. The extent to which their property can be made liable to execution is another question and does not arise here. The first question then is, Were any of the persons present at the examination servants of the defendants? It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anæsthetics, or any of them, were servants in the proper sense of the word; they are all professional men, employed by the defendants to exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendants. The true relation of the parties is, in my opinion, well stated by the Chief Justice in *Glavin* v. *Rhode Island Hospital* (1), where the Chief Justice said: "Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A. out of charity employs a physician to attend B., his sick neighbour, the physician does not become A.'s servant, and A., if he has been duly careful in selecting him, will not be answerable to B. for his malpractice. The reason is that A. does not undertake to treat B. through the agency of the physician, but only to procure for B. the services of the physician. The relation of master and servant is not established between A. and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power not because they are its servants but because of its control of the hospital where their services are rendered. They would not recognize the right of the

(1) 34 Amer. Rep. 675, 679.

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

Farwell L.J.

corporation, while retaining them, to direct them in their treatment of patients." The only duty undertaken by the defendants is to use due care and skill in selecting their medical staff, a duty similar to that undertaken by trustees to their cestui que trust—a duty arising ex contractu: see *Ex parte Adamson* (1), namely, to bring such skill and care to bear on the affairs of their cestui que trust as the reasonable man of business brings to his own. It is not suggested that there is any negligent performance of this duty; indeed, so far as Mr. Lockwood is concerned, the plaintiff went to St. Bartholomew's Hospital in order to be under his charge and to be examined by him. This is in accordance with Walton J.'s decision in *Evans* v. *Liverpool Corporation* (2), with which I entirely agree. The three nurses and the two carriers stand on a somewhat different footing, and I will assume that they are the servants of the defendants. But although they are such servants for general purposes, they are not so for the purposes of operations and examinations by the medical officers. If and so long as they are bound to obey the orders of the defendants, it may well be that they are their servants, but as soon as the door of the theatre or operating room has closed on them for the purposes of an operation (in which term I include examination by the surgeon) they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders. This is well understood, and is indeed essential to the success of operations; no surgeon would undertake the responsibility of operations if his orders and directions were subject to the control of or interference by the governing body. The nurses and carriers, therefore, assisting at an operation cease for the time being to be the servants of the defendants, inasmuch as they take their orders during that period from the operating surgeon alone, and not from the hospital authorities.

The contract of the hospital is not to nurse during the operation, but to supply nurses and others, in whose selection they have taken due care. The relation of the hospital to the patient

(1) (1878) 8 Ch. D. 807, at p. 819. (2) [1906] 1 K. B. 160

in respect of nurses and attendants supplied by the former for an operation on the latter is the same as that of the Association of Nurses to the patient supplied by them with a nurse, as decided by this Court in the case of *Hall* v. *Lees*. (1) I take the test applied by Lord Collins, then Master of the Rolls (2): "They are not put in his place to do an act which he intended to do for himself." The nurses and attendants are not put in the place of the hospital to do work which the governors of the hospital intended to do themselves, because they had not undertaken to operate or assist in operating, but only to supply qualified persons to act as nurses and assistants under the control of the operating surgeon. Let me test it by enlarging the case put by the American Chief Justice in *Glavin* v. *Rhode Island Hospital*. (3) Let me suppose that the good Samaritan not only employs the surgeon, but takes the patient into his own house, and gives him the services of his own servant, whom he believes to be a skilful nurse, in order to assist the surgeon in an operation: the same reasoning would apply—there is no more undertaking by A. to assist the surgeon in the operation than there is to operate; the undertaking is the same in both—to procure the services of surgeon and nurse reasonably believed by him to be competent. I am therefore of opinion that the defendants are not liable at all to the plaintiff. But even if the nurses and carriers were persons for whose negligence the defendants would be liable, the plaintiff would still fail, because it is clear that they are not liable for the negligence of the surgeon. The plaintiff has to prove his case against the defendants, but he does not do so by shewing that he has been injured by the negligence of A., B., C., and D., or of one of them, when the defendants are liable for the negligence of C. and D. only, and not for that of A. and B. He must prove that the defendants are liable, and does not do so by shewing that if C. and D. were the negligent persons they would be liable, but if it is A. and B., then they are not. He must prove affirmatively that the negligence was that of the persons for whom the defendants are liable. I prefer not to express any opinion on

(1) [1904] 2 K. B. 602. (2) [1904] 2 K. B. at p. 615.
(3) 34 Amer. Rep. 679.

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

the question whether the answer to the sixth interrogatory is sufficient evidence to call upon the defendants for an answer.

KENNEDY L.J. In this case the evidence adduced at the trial on behalf of the plaintiff would, it appears to me, have been sufficient to call for an answer from the defendants if the defendants could, in point of law, properly be held responsible to the plaintiff for injury caused to him by negligence on the part of the surgeons and nurses engaged in the surgical examination to which the plaintiff submitted in the hospital of which the defendants are the governors.

The defendants in their answers to interrogatories admitted that all those surgeons and nurses, as well as the anæsthetist and the box carriers (who obviously may, for the purposes of this case, be omitted from consideration), were their servants or agents, and that one arm of the plaintiff, whilst he was lying on the operating table and insensible through the administration of anæsthetics, was burned by contact with a hot water tin which somehow got displaced during the examination. The plaintiff gave some evidence of damage resulting from the burn. It appears to me that, subject always to the reservation I have stated in respect of the nature of the defendants' legal responsibility for the negligent acts or omissions of their professional staff, there was, apart from the statements which two of the surgeons, Mr. Gask and Mr. Roberts, made subsequently to the plaintiff, and which were admitted in evidence without objection on the part of the defendants' counsel, a prima facie case on the issue of negligence in the facts which I have briefly set forth. I think that so far the plaintiff might, in the circumstances, invoke the application of the maxim res ipsa loquitur.

But the difficulty in the plaintiff's way on this appeal, which the learned counsel for the plaintiff has not, in my judgment, been able to surmount in his able and ingenious argument, is this. The legal duty which the hospital authority undertakes towards a patient, to whom it gives the privilege of skilled surgical, medical, and nursing aid within its walls, is an inference of law from the facts. In my opinion it is not the ordinary duty of a person who deals with another through his servants or

agents and undertakes responsibility to that other person for damage resulting from any injury inflicted upon him by the negligence of those servants or agents. In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants.

In the view which I have expressed in regard to the non-liability of the governors of a hospital for the negligence of the professional staff in matters of professional care and skill, provided always that the authority has used reasonable care in

C. A. 1909

HILLYER v. GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL.

Kennedy L.J.

selecting a competent staff and proper apparatus and appliances, I am deciding in accordance with the judgment of my brother Walton in the recent case of *Evans* v. *Liverpool Corporation* (1), and I entirely concur in the reasoning upon which that judgment is based. With the American and New Zealand cases which were cited to us by the learned counsel on both sides I do not think it necessary to deal. They are not in agreement; in one of them, *McDonald* v. *Massachusetts General Hospital* (2), relied upon by the defendants, the judgment appears to have been influenced by an English decision of *Holliday* v. *St. Leonard, Shoreditch* (3), which has been overruled by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (4): see per Blackburn J., *Foreman* v. *Mayor of Canterbury*. (5)

If the view of the limits of the liability of the present defendants as governors of St. Bartholomew's Hospital is correct, Grantham J. was justified in stopping this case at the close of the plaintiff's evidence. The plaintiff had produced no evidence that the defendants had been guilty of a breach of their duties towards the plaintiff—the duty of using reasonable care in selecting as members of the staff persons who were competent, either as surgeons or as nurses, properly to perform their respective parts in the surgical examination, and the duty to provide proper apparatus and appliances.

I prefer to base my judgment that this appeal ought to be dismissed upon this single ground, but I must not in saying this be understood to hold, even if the protection to the hospital authority from liability for the negligence of their agents and servants in matters of professional skill extends only to the case of Mr. Lockwood, that the plaintiff is necessarily extricated from difficulty. That eminent surgeon, who was in charge of the examination, and must in reason and upon the evidence, so far as there is any, be taken to have had the responsibility of controlling and directing the assistant surgeons and nurses in regard to the manipulation of the plaintiff upon the operating table, and in regard to the movement and

(1) [1906] 1 K. B. 160.
(2) 21 Amer. Rep. 529.
(3) (1861) 11 C. B. (N.S.) 192.
(4) (1864) L. R. 1 H. L. 93.
(5) L. R. 6 Q. B. 214, at p. 218.

disposition of the apparatus, was chosen by the plaintiff himself; and I can find no evidence to prove that any one of the surgeons or nurses in attendance either disobeyed or neglected any direction given by him.

Appeal dismissed.

Solicitors: *Warren, Murton & Miller, for R. H. Rushworth, Amersham; Wilde, Moore, Wigstone & Co.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A. 1909 *July* 16, 17, 28.

MASSON, TEMPLIER & CO. *v.* DE FRIES.

Husband and Wife—Married Woman—Judgment Debt—Wearing Apparel—Dresses purchased by Wife—Money supplied by Husband—Wife's separate Estate—Paraphernalia—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75).

Wearing apparel purchased by a married woman for her personal use with money supplied for the purpose by her husband is prima facie her separate property, and, in the absence of evidence to rebut this presumption or to limit or qualify her possessory title, cannot be claimed by the husband as against an execution creditor of the wife.

Observations of Sir F. Jeune P. in *Tasker* v. *Tasker*, [1895] P. 1, on paraphernalia disapproved.

Per Farwell L.J.: Since the Married Women's Property Act, 1882, the old common law exception of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist.

APPEAL from the decision of a Divisional Court (Phillimore and Walton JJ.) which raised the question as to a wife's property in her own wearing apparel purchased with money given to her for the purpose by her husband.

The facts were shortly as follows:

The plaintiffs, the appellants, were a firm of costumiers who had supplied the defendant, Mrs. De Fries, with dresses and various articles of wearing apparel. In April, 1908, the plaintiffs issued a writ against Mrs. De Fries and her husband for some 66*l.*, the balance of the price of goods sold to her between

C. A. 1909

MASSON, TEMPLIER & CO. v. DE FRIES.

November, 1903, and April, 1907. Mr. De Fries thereupon informed the plaintiffs that his authority to his wife was only to buy dresses for cash, and as he provided her with sufficient money from time to time to do this, he was not liable either because they were necessaries or because his wife had express authority to pledge his credit. On May 27, judgment was obtained against Mrs. De Fries alone and execution was levied. A seizure having been made of some dresses and other articles of wearing apparel in the possession of Mrs. De Fries, Mr. De Fries put in a claim that they belonged to him as paraphernalia. An interpleader summons was thereupon issued to try the question of the ownership of these articles. This interpleader was tried in the Brompton County Court with a jury, and, after hearing the evidence and a quotation by the county court judge from the judgment in *Tasker* v. *Tasker* (1) as to the law on paraphernalia, the jury found with regret that the goods seized were the property of the husband. Leave was subsequently given to appeal to the Divisional Court, and that Court came to the conclusion that there was some evidence to justify the finding of the jury and declined to interfere. The plaintiffs thereupon appealed to the Court of Appeal.

Atkin, K.C., and *Crawford*, for the appellants. The goods in question, being the wife's wearing apparel, are claimed by the husband as paraphernalia. The husband made the wife an allowance out of which she bought the clothes in question. The husband exercised no right over the clothes. As regards paraphernalia the goods may be used by the wife, but the husband may sell or dispose of these during the wife's lifetime; he might not dispose of them by will, and after his death they became the property of the wife subject to being liable for the husband's debts. It was a limitation upon the marital right: Lush's Husband and Wife, 2nd ed. p. 46; Blackstone's Commentaries, 8th ed. vol. 2, p. 435. Since the Married Women's Property Act, 1882, there is no reason for the law as to paraphernalia; but in *Tasker* v. *Tasker* (1), the only case in which this question has been discussed, Sir Francis Jeune thought that

(1) [1895] P. 1.

there might still be paraphernalia. That case, however, is distinguishable. There is here no evidence upon which anybody could reasonably find that these articles were not the separate property of the wife, but were paraphernalia. [They also referred (incidentally) to *Graham* v. *Lord Londonderry*. (1)]

[KENNEDY L.J. referred to *Williams* v. *Mercier*. (2)]

The onus is on the husband to shew that these articles were not given absolutely to his wife. It is a question of fact for the jury to decide. The jury were misled by the quotations from *Tasker* v. *Tasker*. (3) Since the law has taken away from the husband the former rights he had in his wife's property, it must be a question of bargain between husband and wife as to the property in the goods, and this is a question of fact.

[FARWELL L.J. Since the Married Women's Property Act, 1882, there can be no question of paraphernalia ; it is a question of fact as to the terms of the gift in each case.]

The necessary inference from the facts here is, that the husband intended to give these articles to his wife as her separate property. There was no evidence to go to the jury on the question of paraphernalia, and their verdict cannot stand.

Samuel Moses, for the respondent, the husband. The question whether a gift to a married woman constitutes paraphernalia must be determined on the same principle now as before the Married Women's Property Act, 1882. *Tasker* v. *Tasker* (3) is a clear authority on this point. The jury were the proper tribunal for determining this fact, and no reason has been given for setting their verdict aside. If a husband gives money to his wife to purchase goods with, the goods when purchased are the husband's; so too are the clothes which he gives his wife the money to purchase. These goods were paid for by the husband for the purpose of enabling his wife to clothe herself suitably, but the property in them is in the husband.

Cur. adv. vult.

July 28. COZENS-HARDY M.R. This is an interpleader issue in which the husband is the claimant, and the question is

(1) (1746) 3 Atk. 393.
(2) (1882) 51 L. J. (Q.B.) 594.
(3) [1895] P. 1.

C. A. 1909

MASSON, TEMPLIER & CO. v. DE FRIES.

Cozens-Hardy M.R.

whether certain goods seized by execution creditors, who have obtained judgment in the *Scott* v. *Morley* (1) form against the wife, are the property of the husband. In the particulars of his claim the husband states the grounds of his claim to be that the goods and chattels were bought out of moneys provided by him, and that he claims the goods "as being part of the paraphernalia" of his wife. The learned county court judge asked the jury whether the dresses were given to the wife so as to become her separate property, or only as paraphernalia for her use so long as the husband chose, and he read to the jury passages from the judgment of Sir Francis Jeune in *Tasker* v. *Tasker* (2) as to the meaning of paraphernalia. The jury found that the goods were the property of the husband. I should say that the goods seized were dresses and other articles of such a nature as for the purposes of this judgment I assume might, after the husband's death, have properly been the subject of a widow's claim to paraphernalia under the old law, although their total value is now small.

It seems to me that the introduction of "paraphernalia" was only calculated to puzzle the jury and to obscure the real issue. There can be no question of paraphernalia during the husband's life. The observations of Sir Francis Jeune in *Tasker* v. *Tasker* (2) on the subject of paraphernalia seem to me unsupported by authority, although his decision was perfectly sound. By common law a widow acquired a title to certain goods and chattels which the husband had not disposed of in his lifetime, a right of a very limited and peculiar nature. It was not the result of any bargain between husband and wife, for such a bargain was impossible at common law. The widow could not claim goods as her paraphernalia by reason of any gift from her husband, for such a gift was at common law impossible. The goods were the property of the husband and at his disposal in his lifetime, and liable to be taken in execution by his creditors, or to answer the claims of his creditors after his death.

Now the facts admitted or not in dispute are that these goods, and similar goods, were purchased by the wife for her own wearing apparel by means of money supplied from time to time

(1) (1887) 20 Q.B.D. 120. (2) [1895] P. 1.

by the husband for the purpose; that the husband did not interfere in the purchases or exercise any control over her in the matter; that she did what she thought proper, and that if she sold any she would not account to him for the money, but would buy other things for herself or the children, or she would alter the dresses for the children. Under these circumstances the question left to the jury was, in my opinion, improper, and the only doubt is whether there must be a new trial, or whether the husband's claim can be negatived on the ground that there was no evidence to support the finding of the jury.

Upon the whole I think it is not necessary to order a new trial. Since the Married Women's Property Act, 1882, the wife is capable of acquiring and holding goods as her separate property. Money was given to the wife for the very purpose of enabling her to buy these articles of apparel for her own personal wear. She bought them, and the property in them was prima facie hers. No evidence was given to rebut this presumption or to limit or qualify her possessory title. The course of dealing with the articles thus purchased was inconsistent with the idea that the husband ever had, or intended to have, any interest in the goods purchased. If a father makes an allowance to an adult daughter to provide herself with clothes, the clothes when purchased will prima facie be the property of the daughter, and it is irrelevant to say that the father found the money. Since the Married Women's Property Act, 1882, the same principle must apply to a wife and to an adult daughter.

I desire to express no opinion upon the question whether a widow since the Married Women's Property Act, 1882, can claim her paraphernalia. I think the decision of the Divisional Court, declining to interfere with the verdict of the jury, cannot be supported, and that the appeal must be allowed, and that judgment must be entered for the appellants with costs in all Courts, except so far as the appellants may be prevented from claiming costs as a term of obtaining leave to appeal.

FARWELL L.J. The facts in this case are very simple and of everyday occurrence. Husband and wife were living together in amity; the husband gave his wife money from time to time in

C. A. 1909

MASSON, TEMPLIER & CO. v. DE FRIES.

Farwell L.J.

order to buy necessaries and clothes suitable for her condition on the terms that she was not to pledge his credit; she did so buy, without any interference from him, and used and wore the purchased articles as she pleased and as long as she pleased, and when she had done with them she either cut them up and adapted them for her children, or gave them away, or sold them, treating the proceeds of sale as her own, and neither rendering nor being asked to render any account thereof to her husband. This is a state of affairs to be found in thousands of houses in the country to-day, and I should have thought that one inference, and one inference only, can possibly be drawn from them, namely, that the husband gave his wife her clothes as her own property, for her own use as she pleased. But in this case the husband's solicitor had met somewhere with the word "paraphernalia": it is true that the husband himself had never heard of it, and did not know what it meant; it is true that he never said anything to his wife or any one else to shew that he did not intend the wife's clothes to be her own property; but his solicitor put in a plea that these articles of ordinary use, dresses, petticoats, dressing jackets, shoes, and the like, were given by him to his wife as paraphernalia, and the county court judge left to the jury the question whether the goods were given to the wife for her separate use or as paraphernalia, instead of asking them whether he gave her the clothes as her own or kept them as his own, giving her the privilege of wearing them as and when he chose. If the latter question had been put, I cannot doubt the answer that any twelve reasonable men would have given. But the jury, confused not merely by the form of the question, but by having read to them by the county court judge a case in the Divorce Division, found (with regret) a verdict for the husband.

The whole difficulty has arisen from a misconception of the meaning of paraphernalia: it was a right given by the common law to a widow; it was not a right of the husband's at all, but was a limitation of the legal rights of his executors or administrators after his death. At common law all the wife's personal chattels were the property of the husband; the marriage made them unica caro, "so that the very being and existence of the woman is suspended during the coverture or entirely merged or

incorporated in that of the husband" (1); and the wife had no separate rights at common law to any personal chattel at all. The idea of her asserting any right to paraphernalia against her husband during his life is out of the question, and any claim by him of his wife's personal chattels as paraphernalia is equally out of the question; such chattels were his own property, and if he claimed them, he claimed them as such. But, in mitigation of this extreme severity, the common law, borrowing to some extent from the civil law, gave to the widow a right to keep certain personal chattels, of which she had had the use during coverture as her own property, after her husband's death. It is thus put by Richardson C.J. and Croke J. in *Hastings* v. *Douglas* (2): "Of all chattels personal, although the wife had them before marriage, the absolute property by the marriage is vested in the husband and he may give them in his life, or dispose of them by his will: so of those goods which are termed paraphernalia the absolute property is in the husband."

So in Comyn's Digest, Baron and Feme, F (*i*). What goes to the wife if she survives. (3.) Paraphernalia "so the wife shall have after the death of the husband as her paraphernalia, a necessary bed and apparel agreeable to the quality of her husband. The property of the paraphernalia is vested in the wife presently upon the death of her husband." So too in Blackstone's Commentaries, vol. 2, 435 (1766): "And as the husband may thus, generally, acquire a property in all the personal substance of his wife, so in one particular instance the wife may acquire a property in some of her husband's goods: which shall remain to her after his death, and shall not go to his executors. These are called her paraphernalia; which is a term borrowed from the civil law, and is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree; which she becomes entitled to at the death of her husband over and above her jointure or dower, and preferably to all other representatives." To the same effect are Godolphin's Orphan's Legacy, p. 130, and Noy's Legal Maxims (Bythewood's edition), p. 241: "Widow. The widow

(1) 2 Bl. Com., p. 433. (2) (1632) Cro. Car. 343, at p. 345.

C. A. 1909

MASSON, TEMPLIER & CO. v. DE FRIES.

Farwell L.J.

shall have all her apparel her bed her copher, her chains, borders, and jewels by the honourable custom of the realm, except her husband unkindly give any of them away or be so in debt that it cannot be paid without her bed &c., yet even in that case she shall have her necessary apparel," for (as it is put in Comyn's Digest) "she ought not to be naked or exposed to shame or cold."

The right was entirely distinct from separate estate, and depended on the common law; although questions in respect of it, arising as they did only after the husband's death, were usually dealt with in Chancery in administering his estate. The right appears to have depended on the actual use of the chattels and the position and rank in life of the widow, and it may be doubted whether any mere declaration by the husband would suffice to establish the widow's claim to more than the chattels used by her and due to her position and rank. At a time when all the wife's personal chattels, including gifts from her husband to her (not for her separate use), at once vested in the husband as his own property, and when he and his wife were incapable of contracting with one another, it is difficult to see how anything binding the husband or his estate by way of gift to wife, or contract between husband and wife, could possibly be effected during his lifetime; but however the existence and extent of paraphernalia may have been proved, it was a claim solely by a widow arising only after her husband's death.

Since the Married Women's Property Act, 1882, has destroyed the husband's right to all his wife's personal chattels and has enabled her to acquire and own them as her own, either absolutely or subject to any lawful condition to which she may agree as if she were a feme sole, a right which was merely a limitation or an exception out of the former legal right of the husband has, in my opinion, no longer any existence. The widow's right arose solely by way of exception out of the generality of the husband's common law right to all her property: cessante ratione cessat et ipsa lex. And it is, moreover, no longer necessary: husband and wife can now make their own arrangements and make them binding as contracts: the husband may

impose what conditions he pleases on making a gift to his wife, and husband and wife may make what bargains they please, not being in fraud of creditors or otherwise illegal. If a husband buys a piece of old lace, he may give it to his wife on the terms that she does not part with it without his permission, but this arrangement would have to be proved by evidence as a matter of fact; it would have to be proved that the condition was imposed, or that the bargain was in fact made, just as if the parties were not husband and wife, but strangers. But, however the claim to paraphernalia was proved under the old law, I am of opinion that "paraphernalia" has nothing whatever to do with the present case; that since the Married Women's Property Act of 1882 the old common law exception of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist; that the jury in this case were misled by the form of question put to them; and that there is not a tittle of evidence to justify a verdict in favour of the husband.

The Divisional Court were influenced by two cases cited to them. The first, *Williams* v. *Mercier* (1), was reversed on appeal, and the observations of the two judges on paraphernalia were obiter only: if either of them intended to suggest that a husband could make a gift to his wife during coverture otherwise than for her separate use which would bind him or his creditors by using the word paraphernalia, the cases cited by them do not justify it. They were all cases of administration of the deceased husband's estate in which "gift" by husband to wife when contrasted with gifts to separate use may well have been used as meaning, giving permission to wear or to use. The real position is clearly stated by Lord Hardwicke in *Graham* v. *Lord Londonderry*. (2) He first deals with a number of gifts to the separate use of the wife, and continues: "I have indeed admitted that a husband may make such gifts, but where he expressly gives any thing to a wife to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might

(1) (1882) 51 L. J. (Q.B.) 594; (1884) 10 App. Cas. 1.
(2) 3 Atk. 393, 394.

C. A. 1909

MASSON, TEMPLIER & Co. v. DE FRIES.

Farwell L.J.

dispose of them absolutely, which would be contrary to his intention."

With regard to *Tasker* v. *Tasker* (1), the decision was that the jewels were given to the wife for her separate use: the dicta of the President cannot in my opinion be supported: it is clear that the wife could never have enforced any claim against her husband in his lifetime to paraphernalia.

In my opinion this appeal should be allowed.

KENNEDY L.J. I have had an opportunity of reading the judgments which have just been delivered by the Master of the Rolls and Farwell L.J., and they have dealt so fully with the law concerning "paraphernalia" that I desire to add nothing in regard to it, except that I reserve my opinion as to whether since the passing of the Married Women's Property Act, 1882, the question of "paraphernalia" can in any case arise. Whether it can or cannot, I must respectfully express my inability to concur in the statement of the law which appears in the judgment of Lord St. Helier in *Tasker* v. *Tasker* (2), and which was read by the learned county court judge in his summing up to the jury in the present case. It appears to me that the only occasion on which an issue as to paraphernalia might perhaps still be raised is a dispute as to the possession of property in the nature of ornaments and the like articles between a wife and the representative of her deceased husband. As between husband and wife, during their lifetime, or between either of them and the execution creditor of the other, the only question as to the property in such articles can be whether they belong to the husband as his own or are the separate property of the wife.

In the present case the matter to be decided at the trial of the interpleader issue was the simple issue which was ordered to be tried, namely, whether these goods were or were not the property of the husband, who claimed them as against the wife's execution creditor. The goods in question consisted of her wearing apparel, dresses, shoes, and the like, which had been bought by her out of moneys given to her by her husband for

(1) [1895] P. 1. (2) [1895] P. 1, at p. 6.

C. A. 1909

MASSON, TEMPLIER & Co. v. DE FRIES.

Kennedy L.J.

the purpose. It appears to me that upon the evidence a jury could not reasonably come to any but one conclusion—that they were the wife's property. They gave "with regret" a verdict for the plaintiff, which can be explained only by the fact that their minds were confused by the introduction of a question as to "paraphernalia" and the reading to them of the passage which I have referred to in the judgment of the learned President of the Probate, Divorce, and Admiralty Division in *Tasker* v. *Tasker*. (1)

In my opinion the verdict cannot be allowed to stand, and this appeal succeeds, and the order must be made which the Master of the Rolls has declared.

Appeal allowed.

Solicitors: *Cohen & Cohen; John Hands.*

W. C. D.

[IN THE COURT OF APPEAL.]

C. A. 1909 *July* 14.

In re W. W. BARTON.
TOMLINS *v.* LATIMER.

Bankruptcy—Liquidation by Arrangement—Trustee in Liquidation—Joint Trustees—Surviving Trustee—Close of Liquidation—Transfer of Assets to Official Receiver—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 159, 160, 161—*Bankruptcy (Discharge and Closure) Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 3, *sub-s.* 1.

Where two persons are appointed joint trustees in a liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869, and one of them dies, the survivor continues to be trustee in the liquidation.

Sect. 3, sub-s. 1, of the Bankruptcy (Discharge and Closure) Act, 1887, does not apply to a liquidation by arrangement under the Bankruptcy Act, 1869, so as to close the liquidation and vest the property of the liquidating debtor in the official receiver.

APPEAL from the decision of a Divisional Court (Bigham and Walton JJ.).

On August 19, 1879, a meeting of the creditors of Mrs. Latimer, a widow carrying on business as an estate agent, was held, and special resolutions were passed and subsequently registered in

(1) [1895] P. 1.

C. A. 1909

BARTON, *In re.* TOMLINS *v.* LATIMER.

the county court of Liverpool (1.) for liquidation of her affairs by arrangement and not in bankruptcy, (2.) for the appointment of W. T. Nelson and R. Tomlins as joint trustees, (3.) for the appointment of a committee of inspection, and (4.) granting the debtor her discharge forthwith. Mrs. Latimer died on May 30, 1890, and Nelson died on September 18, 1900. No resolution for the close of the liquidation had ever been passed. In 1907 the surviving trustee of the will of W. W. Barton (Mrs. Latimer's father), who died in 1859, had in hand a sum of 193*l.* 0*s.* 5*d.*, which was claimed by Tomlins, as trustee under the liquidation resolutions, and by V. B. Latimer, the son of Mrs. Latimer, to whose estate he had obtained letters of administration in December, 1907. An interpleader issue was directed to be tried in the county court of Liverpool, Tomlins to be plaintiff and V. B. Latimer defendant, to determine which of them was entitled to the fund. When this issue came on for trial the learned county court judge held that the plaintiff, inasmuch as he was appointed a joint trustee and the other trustee was dead and no other trustee had been appointed, was not the trustee in the liquidation proceedings and had no interest in the fund; that the former estate of Mrs. Latimer (if any) in the fund was vested in the official receiver at Liverpool; and that, subject to notice to him, the fund ought to be paid to V. B. Latimer. Tomlins appealed, and the Divisional Court dismissed his appeal on the ground that s. 3, sub-s. 1, of the Bankruptcy (Discharge and Closure) Act, 1887, applied to liquidations by arrangement as well as to bankruptcies under the Bankruptcy Act, 1869; that the liquidation was therefore closed and the assets of the liquidating debtor vested in the official receiver attached to the Court having jurisdiction over the liquidation by virtue of s. 160 of the Bankruptcy Act, 1883, and the order issued by the Board of Trade dated January 1, 1884; and that Mrs. Latimer's interest in the fund was vested in the official receiver in bankruptcy at Liverpool.

The Board of Trade appealed in the name of the plaintiff.

Sir S. T. Evans, S.-G., and *Hansell*, for the appellants. The finding of the learned county court judge was wrong, and

Tomlins is still the trustee in the liquidation. It is also submitted that the decision of the Divisional Court was wrong, and that the liquidation has not been closed. Sect. 3, sub-s. 1, of the Bankruptcy (Discharge and Closure) Act, 1887, does not apply to liquidations by arrangement. The Court appears to have been misled by the statement in The Laws of England, by the Earl of Halsbury, vol. 2, p. 325, s. 544, which was cited in the Court below. Sect. 3, sub-s. 1, says that every "bankruptcy" shall be closed. The Act is intituled "An Act to amend the law relating to the discharge of bankrupts and the closure of bankruptcy proceedings," and is carefully drawn so as not to affect liquidations by arrangement. Where it is intended to apply to liquidations, as in s. 6, sub-s. 1, the word "liquidation" is used. Liquidations by arrangement were introduced by s. 125 of the Bankruptcy Act, 1869, and the intention was to keep them quite distinct from bankruptcies. The only way in which a liquidation could be closed was by the will of the creditors: s. 125, sub-s. 9. Sect. 159 of the Bankruptcy Act, 1883, deals with the transfer of an estate in liquidation where there is no trustee. Sect. 160 provides that where a bankruptcy or liquidation "has been or is hereafter closed" outstanding property is to be got in by a person appointed by the Board of Trade. By s. 161 estates in pending bankruptcies were transferred to the official receiver. Therefore the distinction between liquidations and bankruptcies was preserved by that Act also.

Kingsbury, for V. B. Latimer and Mrs. Latimer's other children. It is of no importance to us whether Tomlins is still trustee or not, but if necessary the decision of the county court judge to the effect that he had no title can be supported: s. 83, sub-s. 2, of the Act of 1869; r. 307 of the General Rules, 1870.

[COZENS-HARDY M.R. His decision cannot possibly be right.]

This is a very small fund, and it is a great hardship that it should be saddled with the costs of enabling the Board of Trade to get a decision on a point of law. There is still a question of construction arising on Barton's will, and which this Court may decide now, and thus avoid further expense.

[COZENS-HARDY M.R. We cannot do that. The facts are not before us.]

C. A. 1909

BARTON, *In re.* TOMLINS *v.* LATIMER.

On the point of law it is submitted that s. 3, sub-s. 1, of the Act of 1887 does apply to liquidations. There is no material distinction between them and bankruptcies: s. 125, sub-ss. 5, 6, of the Act of 1869. By s. 125, sub-s. 7, many of the bankruptcy provisions apply to liquidations. Sects. 159, 160, and 161 of the Act of 1883 apply to both bankruptcies and liquidations; and a liquidation is a "bankruptcy proceeding" within the title to the Act of 1887.

No reply was called for.

COZENS-HARDY M.R. With great respect to the learned judges, this seems to me to be a clear case. The short point is this: whether a liquidation by arrangement and not in bankruptcy is a bankruptcy under the Bankruptcy Act, 1869, pending on December 31, 1887, as, if it is, it was closed on that day and the property vested in the official receiver. If one thing is more clear than another it is that most anxious care was taken by the legislation of 1869 to distinguish liquidation by arrangement from bankruptcy. Sect. 125 contains the words "liquidation by arrangement and not in bankruptcy." The provisions throughout are different. In particular there is a different arrangement about the close of bankruptcies. When you come to the Act of 1883 the same distinction is found to prevail. Nowhere in the legislation from 1869 downwards has Parliament been so unwise as to treat liquidation by arrangement as the same thing as bankruptcy.

It seems to me quite clear that the view taken by the Divisional Court was wrong. Sect. 3 of the Bankruptcy (Discharge and Closure) Act, 1887, has no application whatever to the case, and Mr. Tomlins, who is the surviving trustee under the liquidation by arrangement, must proceed with the interpleader proceedings. The merits must be gone into in the Court below, and that Court must decide whether there was any transmissible interest which passed to the trustee under the liquidation by arrangement, or whether, as the respondents here contend, there was no interest at all to pass because the fund vested in the children and grandchildren of Mrs. Latimer. In my opinion this appeal must be allowed.

FARWELL L.J. I agree. I have nothing to add.

KENNEDY L.J. I also agree.

Appeal allowed.

Solicitors: *Solicitor to the Board of Trade; Grundy, Kershaw, Samson & Co., London and Manchester.*

H. C. R.

C. A.
1909
BARTON, *In re.*
TOMLINS *v.* LATIMER.

[IN THE COURT OF APPEAL.]

C. A.
1909
Feb. 3.

GEIRIONYDD RURAL DISTRICT COUNCIL *v.* GREEN.

Highway—Repair—Expenses — Extraordinary Traffic — Excessive Weight—Timber Haulage—Staple Trade of District—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The question whether traffic on any particular road is or is not extraordinary within the meaning of the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, is a question of fact; accordingly if, in an action by a highway authority to recover expenses of extraordinary traffic, it is proved that the traffic complained of was a recognized industry in the district and was carried on in the manner usual in the trade in that district, it is still open to the Court to find that the traffic in question is extraordinary as regards any particular road in the district.

APPEAL from a decision of the Divisional Court (Channell and Sutton JJ.).

The action was brought in the county court at Llanrwst under the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898 (1), for extraordinary

(1) By s. 23 of the Highways and Locomotives (Amendment) Act, 1878, "Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case

C. A. 1909

GEIRIONYDD RURAL COUNCIL v. GREEN.

expenses incurred by the plaintiffs as the highway authority in the repair of a certain highway within their district by reason of the damage alleged to have been caused by the defendants by excessive weight passing along the same or by extraordinary traffic thereon.

The defendants, who were timber buyers and merchants at Bangor, had purchased certain standing timber from Lord Penrhyn, which they had felled and carried away. The use of the road by the defendants was admitted; it was also admitted that their waggons had done some damage, although not to the amount claimed. The main defence to the action was that as timber growing was a recognized industry in the district, and as the haulage of timber by the defendants along the road in question was conducted in the manner usual in the trade in that district, this was not extraordinary traffic.

The facts found by the county court judge were as follows. The road in question was a narrow road, having a width of macadam of only seven feet (the road not being wide enough for two carts to pass each other), and having gradients as steep in some parts as 1 in 8. Prior to the user by the defendants the road was in fair average repair, and was used solely for the usual agricultural traffic, consisting of small loads (never exceeding from a ton to 25 cwt.) of coal or lime to the farms, corn to the mill, or wool or other farm produce carried in ordinary farm carts weighing about 10 cwt. to 15 cwt. Timber growing, timber felling, and timber hauling were a recognized industry in portions of the plaintiffs' district; and although the traffic of timber hauling along any particular road was intermittent and not continuous (the intervals being periods of many years, long enough to allow of the growth and ripening of the trees), yet timber felling and hauling did go on more or less each year

to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid . . . ."

This section was amended by s. 12 of the Locomotives Act, 1898, which, so far as material, provides that expenses under s. 23 of the Act of 1878 shall cease to be recoverable by summary proceedings, but may be recovered if not exceeding 250*l.* in the county court, and substitutes for the words "by whose order" the words "by or in consequence of whose order."

in some parish or other of the plaintiffs' district. There had been only one previous occasion on which timber had been hauled along this particular road, and that was thirty-five or forty years ago, but on that occasion no damage was done to the road, nor was the weight of each particular load alleged to have been excessive. The hauling of timber along this particular road by the defendants was carried on by means of timber waggons of the recognized and usual type, but the weight of the timber carried within a given period and the weight of each load were much in excess of the ordinary traffic on this particular road, being sixty-five tons in fifteen days, and, including the waggons, each load was from four to five tons.

In the result the county court judge came to the conclusion that the traffic of the defendants on this particular road was extraordinary and that the weights carried were excessive, and he gave judgment for the plaintiffs for 25*l.* and costs.

The defendants appealed to the Divisional Court, but that Court refused to interfere with the county court judge's finding and dismissed the appeal.

The defendants now appealed to the Court of Appeal.

Ernest Charles, for the appellants. There was here no evidence to support the finding of the county court judge that this traffic was extraordinary and the weight excessive, and he has also misdirected himself as to the law. He has found that timber felling and hauling was a recognized industry in the district, and that the haulage of this timber by the defendants was conducted in the manner usual in the trade in this district; that is to say that the waggons used were of the ordinary recognized type, and that the loads carried were the ordinary loads of the trade. When once it is found that timber hauling is ordinary traffic, and that this traffic is carried on in the ordinary way, it is not open to the Court to find that the traffic is extraordinary or the weight excessive. This is a test case affecting the whole timber trade of the country. Timber cutting is, from the nature of the trade, intermittent, inasmuch as an interval of some thirty or forty years must elapse to allow time for the trees to mature, but that does not make this traffic extraordinary, and the county

C. A. 1909

GEIRIONYDD RURAL COUNCIL v. GREEN.

court judge was in error in speaking of the usual traffic in the road in question as the ordinary traffic to the exclusion of timber haulage. There is no difference between this road and other roads in the district; they are all mountainous roads, and all that the defendants claim for this road, as for the other roads, is that it shall be fit to carry the ordinary traffic of the district. [He referred to *Raglan Highway Board* v. *Monmouth Steam Co.* (1) and *Wallington* v. *Hoskins.* (2)]

Macmorran, K.C., and *Trevor Lloyd*, for the respondents, were not called upon.

COZENS-HARDY M.R. This is an appeal from a decision of the Divisional Court confirming the judgment of the county court judge. I might almost content myself with saying that I agree with and desire to adopt without any qualification the judgment of Channell J., but having regard to the very clear and able argument of Mr. Charles, it is desirable that I should say a few words. The question is whether the plaintiffs, who are the rural district council, can recover from the defendants a sum representing—I am not using technical language now, but am purposely using general language—the extra cost to which they have been put in repairing a particular road by reason of extraordinary traffic over it. That damage was done is admitted; that it was due to the carting over a road more or less mountainous, certainly with very steep gradients, certainly very narrow, of timber in waggons of great weight is admitted. Channell J. said, and I think with perfect truth, that the question what was extraordinary traffic in any particular road at any particular time was not a question of law but a question of fact, and there was evidence which, as it seems to me, plainly justified the county court judge in finding, as he did, that this was extraordinary traffic. The facts as found by the county court judge, whose findings we cannot interfere with, are these: This is a narrow road, of which only seven feet are macadamized, a road with a very steep gradient, at any rate in one part, and a road which is sufficient for agricultural purposes. There are farms on each side of the road, and the farmers who were called said, and the learned

(1) (1881) 46 J. P. 598. (2) (1880) 6 Q. B. D. 206.

judge believed them, that it was a road adequate for those purposes. But then it is said that the growing, felling, and hauling of timber are recognized industries in this district, it being a hilly though not actually a mountainous district in North Wales. All that is true. Then it is argued that, timber hauling being a recognized industry in the district, although it may be only once in thirty or forty years that this road will be used for carting timber, it is the duty of the local authority not to complain if once in thirty or forty years there is damage done by the haulage, that industry being a recognized industry in the neighbourhood, and the timber being hauled in a mode which is usual in that neighbourhood. That argument, it seems to me, overlooks some very material facts upon which the county court judge was justified in finding—though it may be that he was not bound to find—that this traffic was extraordinary. He found as a fact that in the only known instance in which timber had been hauled along this road, I think for some twelve days at a time, some thirty-five or forty years ago, it was so hauled that no damage was done to the road, and it was hauled by means of vehicles which were of much less weight than the vehicles which carried the timber in the present case. In these circumstances he has held as a matter of fact that this was extraordinary traffic carried over this road in a manner which unreasonably and unnecessarily caused extra damage and extra expense to the plaintiffs. It seems to me impossible to say that there was no evidence to support that finding. That being so, no question of law arises in this case, and the attempt to treat this as a test case must entirely fail. Upon the facts I think that the decision of the Divisional Court was quite right and that this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion and I have nothing to add.

BUCKLEY L.J. This road is situate in a neighbourhood where it is reasonably to be expected that at long periods, say every forty years, the road will be used for the purpose of the hauling of timber. For the purposes of this judgment I assume, without

C. A. 1909

GEIRIONYDD RURAL COUNCIL v. GREEN.

Buckley L.J.

deciding, that that would constitute ordinary traffic in the sense that it would be the duty of the highway authority to provide for such traffic arising even at such long intervals as that. Assuming, then, that the haulage of timber on this road is ordinary although periodic, it remains that the haulage may be done in many ways. The question is whether on this road, being such a road as it is, with such gradients as it bears, the haulage which was done was so done as that on this road the traffic was extraordinary or the weight was excessive. To my mind that is simply a question of fact. Was or was not the timber so carried as that upon this road the weight carried in each waggon was excessive and thereby damage was caused by excessive weight passing along the road? Upon that question of fact it is not for us to review the finding of the county court judge. I think he has found as a matter of fact that it was extraordinary traffic or excessive weight which caused the damage, and it is not for us to review that finding. Upon these grounds I agree with the decision of the county court judge.

Appeal dismissed.

Solicitors for appellants: *Trinder, Capron & Co.*

Solicitors for respondents: *Lindus & Hortin, for A. Lloyd Griffith, Llanrwst.*

H. B. H.

THE KING *v.* RICHARDSON.

1909
July 2.

Summary Jurisdiction—Separation Order—Order for Maintenance of Wife—Non-payment by Husband—Absence of Evidence of Means—Committal to Prison—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.* c. 39), *ss.* 5, 9.

Where an order of justices is made under the Summary Jurisdiction (Married Women) Act, 1895, ordering a husband to pay to his wife a weekly sum by way of alimony, although the justices ought to have evidence before them of the husband's means at the time of making the order, if he fails at any time to comply with that order, while it stands unvaried and undischarged, they have jurisdiction to commit him to prison for such non-compliance notwithstanding that they have no evidence of his means at the date when the payment accrued due.

CERTIORARI to justices of Kent to bring up a warrant of commitment.

On November 1, 1898, Charles William Sherry, a ship's cook, was convicted by a Court of summary jurisdiction of having been guilty of persistent cruelty to his wife and having caused her to leave and live separately and apart from him, and he was ordered to pay her the weekly sum of 1*l.* until the order should be altered, varied, or discharged. No payment was ever made by him under that order. Ten years later, on October 10, 1908, he was brought up before the justices upon a warrant for disobedience of the order, there being then due from him the sum of 515*l.* under it, and he was committed to prison for three months subject to a case for the opinion of the High Court. Upon the case being argued in the High Court it was dismissed, and Sherry served his term of imprisonment. In the meantime, on March 2, 1909, he applied to the justices to vary the order for payment by him of 1*l.* a week, but the justices refused to do so upon the ground that in directing payment by him to his wife of 1*l.* a week they were only allowing her a sum which was less than one-fourth of his earnings after taking into account his free quarters on board ship and other emoluments in addition to his wages, and they accordingly dismissed the application with 2*l.* 6*s.* costs. Upon his discharge from prison he was again arrested and brought before the justices on June 1 upon an information laid by his wife for

1909

REX v. RICHARDSON.

non-payment of the sum of 12*l.* arrears of maintenance money that had accrued due under the order of November 1, 1898, during the period that he had been in prison, and at the same time he appeared in answer to a judgment summons against him for non-payment of the 2*l.* 6*s.* due for costs. The judgment summons was heard first, and upon that hearing the solicitor for the wife gave evidence that since the summons to vary was dismissed the defendant through his solicitor had offered to pay to his wife a sum of 20*l.* The justices were satisfied that he had the means to pay the costs and committed him to prison for fourteen days in default of payment. They then proceeded to hear the information for non-payment of the 12*l.* arrears of maintenance. The defendant admitted that the money was due and owing and that he had no goods whereon to levy a distress. No evidence was given of the defendant's means. The justices committed him to prison for six weeks, the two commitments being ordered to run concurrently. The defendant having obtained a rule for a certiorari to bring up the latter warrant of commitment to be quashed upon the ground that in the absence of evidence of means there was no jurisdiction to issue it—

C. M. Pitman, for the justices, shewed cause. It was immaterial that upon the hearing of the information for the non-payment of arrears of maintenance money no evidence was given of the defendant's means, for the disobedience of the order of November 1, 1898, was a criminal offence, and the enforcement of that order was in the nature of a conviction. Sect. 9 of the Summary Jurisdiction (Married Women) Act, 1895, provides that "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." The mode of enforcing payment of money under an order of affiliation is prescribed by s. 4 of the Bastardy Act, 1872 (35 & 36 Vict. c. 65). By that section, if the putative father neglects or refuses to pay the sums due from him under the order, the justices may by warrant "direct the sum so appearing to be due . . . . to be recovered by distress and sale of the goods and

chattels of such putative father," and "if upon the return of such warrant, or if by the admission of such putative father it appear that no sufficient distress can be had," the justices may "cause such putative father to be committed to the common gaol . . . . for any term not exceeding three calendar months unless such sum . . . . be sooner paid and satisfied." Nothing is there said about the defendant having sufficient means to pay. The only conditions of the jurisdiction to commit to prison are that the money is due and that there is no sufficient distress. The breach of the order upon a father to support his bastard child is treated as a crime, the penalty for which he can pay in his person if he cannot in his purse. And this is made quite clear by s. 54 of the Summary Jurisdiction Act, 1879, which provides that "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information."

Guy Lushington, for the wife. Even if evidence of the defendant's means were necessary the objection in the present case would be purely technical, for the justices had abundant evidence of his means both on the hearing of the summons to vary the order of November 1, 1898, and on the hearing of the summons for non-payment of costs.

Sylvain Mayer, in support of the rule. There was no jurisdiction to commit the defendant to prison without proof of his means to pay at the time when the payments accrued due. There was nothing criminal in the non-payment of the money due under the order; it was a civil debt. The justices' jurisdiction under s. 4 of the Bastardy Act to commit the putative father to prison only arises "in case such putative father neglect or refuse to make payment of the sums due from time to time under such order," and a man cannot be said to "neglect or refuse" to pay when he has not got the means to do so. In *In re Gamble* (1) it was held that, where money is due under an order of justices made on a person for the maintenance of his father under 43 Eliz.

(1) [1899] 1 Q. B. 305.

1909

REX v. RICHARDSON.

c. 2, an order of justices for the payment of the money so due cannot be enforced by imprisonment in default of distress unless it be proved that the person in default has since the date of the latter order had the means to pay the sum in respect of which he has made default. The test whether a sum of money payable under an order of justices is a civil debt or a penalty is whether it is "a sum of money previously ascertained to be due": per Field J., *Reg.* v. *Paget.* (1) Here the amount of the arrears was already ascertained at the date of the information, and it was therefore a civil debt. The language of s. 9 of the Act of 1895, that an order under that Act may be enforced in the same manner as an affiliation order, means nothing more than that proceedings may be taken before justices to enforce it, instead of an action being brought in the county court. It does not compel the complainant to go before the justices, it leaves it optional which procedure shall be adopted. If, then, the money payable under the maintenance order was in other respects a civil debt, the provision of s. 54 of the Summary Jurisdiction Act, 1879, that the money shall be levied in like manner as if the order were a conviction on information does not make it any the less a civil debt. In *Reg.* v. *Kerswill* (2) it was held that s. 66 of the Towns Police Clauses Act, 1847, which provided that if the hirer of a hackney carriage refused to pay the authorized fare to the driver the fare might "be recovered before one justice as a penalty," did not entitle the justices to commit the hirer to prison in default of distress. Charles J. said: "It is clear that the mere statement in an Act of Parliament that a sum is recoverable as a penalty does not turn the non-payment of what is merely a debt into an offence. The authority for that is to be found in *Reg.* v. *Master.*" (3) In *Earnshaw* v. *Earnshaw* (4) the Court held that on an application by the wife for an order under s. 4 of the Act of 1895 evidence of means cannot be entirely dispensed with.

[LORD ALVERSTONE C.J. That decision only applies to the original application for a maintenance order, not to the application for its enforcement.]

(1) (1881) 8 Q. B. D. 151, at p. 156.
(2) [1895] 1 Q. B. 1.
(3) (1869) L. R. 4 Q. B. 285.
(4) [1896] P. 160.

1909

REX v. RICHARDSON.

But if evidence of means is necessary when the original order is made, a fortiori is it necessary when the order comes to be enforced. Otherwise a man might be imprisoned for the rest of his life merely because he is unable to pay.

Pitman, in reply.

LORD ALVERSTONE C.J. This is an application for a certiorari to bring up a warrant of commitment dated June 1, 1909, under which the applicant was committed to prison for non-payment of the money therein referred to. The warrant in question recited that the applicant Charles Edward Sherry had in November, 1898, been found guilty under the Summary Jurisdiction (Married Women) Act, 1895, of persistent cruelty to his wife and had been ordered to pay her a weekly sum of 1*l.*, that the said order had not been varied or discharged, that there was in arrear under it the sum of 12*l.* on May 28, 1909, and that the applicant had no goods on which distress for such arrears could be levied, and ordered the applicant to be detained in prison for a period of six weeks unless the said arrears should be sooner paid and satisfied. The contention is that that warrant is bad because it did not contain a statement that the applicant had the means to pay and refused to do so. Now s. 9 of the Act of 1895, the Act under which the order for payment of the money was made, provides that "The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation." Mr. Mayer says that only refers to the tribunal, and means nothing more than that the wife may enforce the payment of the money in a Court of summary jurisdiction instead of in the county court. But I think this section means what it says, that the payment is to be enforced "in the same manner" as payment under a bastardy order. In order to ascertain how payment under a bastardy order is enforced we must look at s. 4 of the Bastardy Act, 1872. By that section, on proof that the defendant is the father of a bastard child, the justices may, "if they see fit, having regard to all the circumstances of the case," make an order on the putative father for the payment of

1909

REX v. RICHARDSON.

Lord Alverstone C.J.

a weekly sum not exceeding five shillings for the maintenance and education of the child, and "in case such putative father neglect or refuse to make payment of the sums due from him under such order," they may direct the sums to be recovered by distress, and "if it appear that no sufficient distress can be had" they may commit him to prison for any term not exceeding three months, unless the money be sooner paid. It is not necessary to decide whether the punishment of imprisonment under those circumstances wipes out the defendant's liability for the past arrears, though I am inclined to think that it does. But whether it does or not, the order committing the man to prison for non-payment is in the nature of a criminal conviction, the disobedience of the earlier order being treated as a contempt which may be purged by payment. That this is so seems clear from the language of s. 54 of the Summary Jurisdiction Act, 1879, which provides that "This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information." That Act deals with two classes of proceedings, in one of which the proceedings are in their nature civil and are founded upon a complaint, and in the other of which the proceedings are criminal and are founded upon an information, and the section expressly says that the enforcement of a bastardy order shall belong to the latter class. Mr. Mayer relied upon the case of *Earnshaw* v. *Earnshaw*.(1) But all that that case decides is that before the original order for the payment of the weekly sums by the husband is made there must be proof that he has the means to pay, and in my opinion that decision is right. But that case does not warrant the conclusion that unless there be proof of means at the time that the payments accrue due the justices cannot send him to prison for neglecting to pay the money. Some other cases were cited in which the Courts had held that under certain circumstances money payable under an order of justices was to be treated as a civil debt. But I do not

(1) [1896] P. 160.

think it can be contended that the principle of those cases can be applied to the case of non-payment of money due under a bastardy order. There is not a word to be found in the Bastardy Act requiring proof of means at the date of the enforcement of the bastardy order. To hold that it was necessary at that stage would be to reverse the long-established practice in bastardy. The defendant's means are no doubt a matter to be taken into consideration by the justices when making the original affiliation order, but when once that order has been made no further inquiry as to means is required. No doubt it would be a strange thing if a man who has been committed to prison for non-payment of money under such an order and who has served his sentence were immediately upon his coming out of prison to be committed again for non-payment of the arrears that had accrued in the interval. But in my opinion the justices have jurisdiction to commit him even though he has no means to pay. They would in practice, however, issue the warrant only if they thought that under the circumstances the man's omission to make the payments was deserving of punishment.

DARLING J. I am of the same opinion. I cannot accept Mr. Mayer's contention that all that was meant by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, was that the proceedings may be taken in a Court of summary jurisdiction. If that was all that was meant, why did not the Legislature say so? Why should the section have referred to proceedings in bastardy if it was not intended that when the complainant had got before the justices the proceedings should be conducted in the same manner as the corresponding proceedings under the Bastardy Act? And under that Act upon an application for commitment any inquiry as to means is unnecessary. *Earnshaw* v. *Earnshaw* (1) shews that under the Act of 1895, upon an application for an order for the payment of maintenance money, an inquiry as to the husband's means must be made, but not that such an inquiry should be made upon the hearing of a summons for disobedience of that order. To hold otherwise would be throwing upon the wife the burden of shewing week by week that her

(1) [1896] P. 160.

1909

REX v. RICHARDSON.

Darling J.

husband had money in hand, a burden which the Legislature could never have intended. But though on the commitment being asked for it is not necessary to shew that the husband has means, if he can satisfy the justices that he has no means they are not obliged to send him to prison. I think they may be trusted not to exercise their jurisdiction oppressively, or to allow the proceedings to be taken for the purpose of blackmailing, in the same way that they must be trusted not to do so in proceedings under the Bastardy Act.

JELF J. I agree that the justices had jurisdiction to issue the warrant without affirmative proof of means.

Rule discharged.

Solicitors for the applicant: *Young, Son & Ward.*
Solicitors for the justices: *Marshall & Liddle, Anerley.*
Solicitors for Mrs. Sherry: *Aird, Hood & Co., Croydon.*

J. F. C.

K. B. D.
1909
March 1, 2; *April* 20, 24.

C. A.
1909
July 15, 16, 30.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

CLARKE *v.* WEST HAM CORPORATION.

Carrier—Tramway Company—Common Carrier of Passengers—Negligence—Liability for Personal Injuries—Special Condition limiting Liability.

A municipal corporation owned a tramway constructed under statutory powers. In accordance with a statutory requirement they exhibited in a conspicuous place in their tramcars a list of the fares to be exacted, and they appended thereto a special notice to passengers stating, as the fact was, that the fares charged were less than the maximum authorized charges, and that in consideration thereof a passenger was only carried on the terms that the maximum amount recoverable from the corporation on account of any injury suffered by a passenger and for which the corporation were legally liable was 25*l.*:—

Held, affirming the decision of Lord Coleridge J. (by Cozens-Hardy M.R. upon the construction of the statutes regulating the tramway, by Farwell L.J. upon the ground that the corporation were common carriers of passengers at common law in the sense that they were bound to carry according to their profession, and by Kennedy L.J. upon both grounds), that, so long as the tramway was open for public

traffic, the corporation were bound to carry any passenger, not being an objectionable person, who offered himself and was willing to pay the published fare, provided they had accommodation for him, and were not entitled to impose a condition limiting their liability for negligence without giving the passenger the option of travelling at a higher fare without any such condition.

Semble per Cozens-Hardy M.R. and Farwell L.J.: If the corporation published alternative lists of fares, one containing the maximum rates, and the other containing reduced rates, and gave an option to the passenger to pay either the full rate without any condition limiting their liability or the reduced rate with such a condition, a passenger electing to pay the smaller rate would be bound by the condition.

FURTHER CONSIDERATION upon the trial of an action before Lord Coleridge J. and a common jury.

The defendants were the tramway authority for the borough of West Ham, in the county of Essex, and the owners of tramways within the said borough known as the West Ham Corporation tramways.

The tramway in question in this action was that part of the defendants' system known as the "Barking Road lines" and was originally constructed under the North Metropolitan Tramways Act, 1884 (47 & 48 Vict. c. clxviii.).

By s. 4 of that Act the North Metropolitan Tramways Company were authorized, subject to the provisions of that Act and of Parts II. and III. of the Tramways Act, 1870 (which were incorporated therewith), to lay down and maintain, among others, certain lines known as the Barking Road lines, distinguished as therein mentioned on the deposited plans and consisting of two furlongs and three chains of double line and one mile and seventy-five links of single line commencing in Barking Road at a point about two and a half chains west of Victoria Dock Road and passing thence in an easterly direction and terminating in Barking Road at a point about six chains east of Greengate Street.

By s. 10 the company were required to maintain and keep the tramways authorized by the Act and all other tramways belonging to the company in good condition and repair to the satisfaction of the road authority of the district within which such tramways were situate, and were made liable to a penalty in case of default.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

By s. 44, if the company should fail within the period limited by the Act to complete the tramways they were made liable to a penalty of 50*l.* a day for every day after the expiration of the period so limited "until the said tramways are completed and opened for public traffic," or until the sums received in respect of the penalty should amount to 5 per cent. on the estimated cost of the uncompleted tramways.

By s. 46 the tramways were to be completed within two years from the passing of the Act, and on the expiration of that period the powers granted by the Act for executing the tramways were to cease to be exercised except as to so much as should then be completed.

Sect. 48 provided as follows: "Subject to the provisions of this Act the company may demand and take in respect of the tramways the tolls and charges which they are by the North Metropolitan Tramways Act, 1869, authorized to demand and take with respect to the tramways by that Act authorized, and sections sixty-seven and sixty-eight and seventy to seventy-three (both inclusive) of the said Act and section thirty-four of the North Metropolitan Tramways Act, 1870, are incorporated with and form part of this Act and shall extend and apply to the tramways by this Act authorized and the passengers using the same and the tolls to be taken for the use of the same as fully and effectually to all intents and purposes as if those sections had been repeated and expressly re-enacted in this Act with reference thereto."

By s. 50 the company were prohibited from demanding or taking from any passenger travelling whether inside or outside a tramcar on the Barking Road lines any greater sum than one penny.

By s. 67 of the North Metropolitan Tramways Act, 1869 (32 & 33 Vict. c. ci.), the company were empowered to demand and take for every passenger travelling upon any of the tramways, or any part or parts thereof respectively, including tolls for the use of the tramway and of carriages and for motive power, and every other expense incidental to such conveyance, any tolls or charges not exceeding one penny per mile (and for that purpose the fraction of a mile beyond an integral number of miles was to

be deemed a mile); but the company were authorized to charge for any less distance than three miles any sum not exceeding three pence.

By s. 68 every passenger travelling upon the tramways was empowered to take with him his personal luggage, not exceeding twenty-eight pounds in weight, without any charge being made for the same.

By s. 69 the company were required at all times after the opening of the tramways for public traffic to run at least two carriages each way every morning in the week and every evening in the week (Sundays, Christmas Day, and Good Friday always excepted) at such hours, not being later than seven in the morning or earlier than six in the evening respectively, as the company should think most convenient for artisans, mechanics, and daily labourers, at fares not exceeding one halfpenny per mile (the company, nevertheless, not being required to take any fare less than one penny).

By s. 70 it was provided that the company should not be bound to carry, unless they thought fit, any parcel, goods, articles or things other than passengers' luggage not exceeding the weight in the Act in that behalf mentioned.

The Act further provided as follows:

Sect. 71. "A list of all the tolls and charges authorized by this Act to be taken and which shall be exacted by the company shall be exhibited in some conspicuous place on the inside of each of the carriages used by the company upon any of their tramways."

Sect. 72. "The tolls and charges by this Act authorized shall be paid to such persons and at such places upon or near the tramways, and in such manner and under such regulations, as the company shall by notice to be annexed to the list of tolls appoint."

By s. 34 of the North Metropolitan Tramways Act, 1870 (33 & 34 Vict. c. clxxii.), the company were required to run carriages each way every morning in the week and every evening in the week for artisans, mechanics, and daily labourers at such fares as might be from time to time fixed by the Board of Trade,

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

By s. 6 of the West Ham Corporation Act, 1898 (61 & 62 Vict. c. cclix.), the defendants were empowered to place and run carriages on and to work and to demand and take tolls and charges in respect of any of the tramways within the borough of West Ham authorized by the North Metropolitan Tramways Act, 1870 (33 & 34 Vict. c. clxxii.), and the North Metropolitan Tramways Act, 1884 (47 & 48 Vict. c. clxviii.), which were to be purchased or acquired by them, and in respect of the use of such carriages and generally to exercise the same powers of working such tramways as were possessed by the North Metropolitan Tramways Company prior to such purchase, and to provide, maintain, and use such carriages and stables, buildings, trucks, harness, machinery, apparatus, horses, steam, cable, electric, and other plant, appliances, and conveniences as might be requisite and expedient for the convenient working and user of the said tramways by animal or mechanical power, and to employ such persons as might be requisite or convenient for that purpose.

Sect. 8 (so far as material) provided as follows: "The carriages used on any such tramways when so purchased or acquired by the corporation may be moved by mechanical power subject to the following provisions (that is to say):—

"(1.) The mechanical power shall not be used except with the consent and according to a system approved by the Board of Trade:

"(2.) The Board of Trade shall make regulations (in this Act referred to as 'the Board of Trade Regulations') for securing to the public all reasonable protection against danger arising from the use under this Act of mechanical power on the said tramways and for regulating the use of electric power:"

By sub-s. 3 the corporation using any mechanical power on such tramways contrary to the provisions of the Act or of the Board of Trade Regulations were made liable to a penalty.

In pursuance of this enactment the Board of Trade made regulations dated January 19, 1906, being No. 67 of the Statutory Rules and Orders of 1906. No. 12 of these regulations was in the following terms:—"The trolley standard of every double-decked carriage shall be electrically connected to the wheels of

the carriage in such manner as either to prevent the possibility of this standard becoming electrically charged from any defect in the electrical conductors contained within it or give a continuous warning signal to the driver or conductor. No passenger shall be allowed to travel on the roof of a carriage as long as there is risk of electric shock."

In a conspicuous position in their tramcars the defendants affixed a list of fares, some of which amounted to one halfpenny and were less than the maximum charges authorized, and also a written notice to the following effect:—"Special notice to passengers.—Passengers are being carried at less than the maximum authorized charges, and every passenger is notified that in consideration thereof a passenger is only carried on the terms that the maximum amount recoverable from the corporation on account of any injury or damages suffered by a passenger and for which the corporation is legally liable is twenty-five pounds. Except as above every passenger travels at his own risk. Passengers can only travel subject to being bound to observe the by-laws for the time being." The by-laws contained a provision that any person who was in a state of intoxication, or who from that or any other cause was, in the opinion of the conductor, unfit to be a passenger, should not be allowed to board or enter upon any car.

The tickets handed by the defendants' servants to passengers on the tramcars contained a statement that they were issued subject to a limit of liability to the amount of 25*l.* in respect of accidents and a reference to the aforesaid notice.

On July 20, 1907, the plaintiff, as an ordinary passenger, got on to the top of a two-decked tramcar of the defendants' travelling from Trinity Church in Barking Road in the direction of Greengate Street. To steady himself while advancing to a seat he laid his hand upon the trolley standard and received a violent shock. The plaintiff had formerly been for two years a motor man in the service of the defendants and was well aware of the notices in the tramcars and upon the tickets purporting to limit the liability of the defendants for injury or damage suffered by passengers. On the occasion in question he was given and he received a ticket referring to the notice affixed

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

to the tramcar, for which the toll or charge of one halfpenny was exacted.

Under these circumstances the plaintiff brought this action against the defendants for personal injuries sustained by him through their alleged negligence.

The questions put by the learned judge to the jury, and their answers thereto, were as follows:

(1.) Was the ticket which the plaintiff paid for given him before or after the accident?—After the accident.

(2.) Was rule 12 of the Board of Trade regulations complied with by the defendants?—No.

(3.) What damages has the plaintiff suffered?—Five hundred pounds.

The case now came on for further consideration upon these findings.

Simon, K.C., *Edmond Browne*, and *A. W. Elkin*, for the plaintiff. It is a well-known rule of law that a corporation empowered by statute to construct works for the use of the public and to take tolls from persons using their works is bound to take all reasonable care to have its works in a safe condition: *Parnaby* v. *Lancaster Canal Co.* (1); *Mersey Docks Trustees* v. *Gibbs*. (2) Even a private person who invites others on to his property is bound to take reasonable care to prevent damage from unusual danger of which he knows or ought to know: *Indermaur* v. *Dames*. (3) In the case of a public body empowered by the Legislature to construct for the use of the public a railway, tramway, dock, or other work, and to take a toll from the public for the use of the works, the duty is of a more stringent nature. The important and substantial question in this case is how far such public bodies may limit their liability for the non-performance of that duty. It is submitted that they cannot at their mere will and pleasure dictate to any member of the public the terms on which they will perform that duty. Every member of the public is entitled to exact an unconditional performance of the duty if he chooses to demand it. The only way in which a

(1) (1839) 11 Ad. & E. 223.
(2) (1866) L. R. 1 H. L. 93.
(3) (1866) L. R. 1 C. P. 274; on appeal, (1867) L. R. 2 C. P. 311.

corporation can limit its liability is by giving an alternative rate or making an alternative charge for the use of its works. This is commonly done by railway companies, who are by s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), bound to afford all reasonable facilities for the receiving, forwarding, and delivering of traffic, including passengers, upon their railways, and who by s. 7 of the Act may make conditions, provided they are just and reasonable, with respect to the receiving, forwarding, and delivery of goods. When railway companies seek to limit their liability in respect of the carriage of goods upon their railways, the question whether the limitation of liability is just and reasonable sometimes turns upon the fact that they have quoted two rates, at one of which they carry at their own risk, and at the other of which they carry at the owner's risk: *Lewis* v. *Great Western Ry. Co.* (1); *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Brown* (2); *Great Western Ry. Co.* v. *McCarthy.* (3) In the present case no alternative charge is offered. The charges exhibited in the list were the only fares which the defendants did or, while the list remained unaltered, could charge: *Gregson* v. *Potter.* (4)

In the present case there is a direct statutory duty imposed upon the defendants in the terms of No. 12 of the Board of Trade Regulations (No. 67 of the Statutory Rules and Orders of 1906). It is true that by s. 8, sub-s. 3, of the West Ham Corporation Act, 1898, a penalty is imposed for a breach of this regulation, but that does not preclude a person of the class for whose benefit the regulation is made from bringing an action on the case for breach of the regulation and recovering general damages: *Groves* v. *Lord Wimborne.* (5)

Dickens, K.C., *Danckwerts, K.C.*, and *Morten*, for the defendants. Tramway companies are not common carriers of passengers; they are not bound either at common law or by statute to carry anybody, and the public are not by law or by necessity compelled to be carried on the tramways. Consequently the terms

(1) (1877) 3 Q. B. D. 195.
(2) (1883) 8 App. Cas. 703.
(3) (1887) 12 App. Cas. 218.
(4) (1879) 4 Ex. D. 142.
(5) [1898] 2 Q. B. 402.

1909

CLARKE v. WEST HAM CORPORATION.

on which the former carry and the latter are carried depend entirely on the contract between the companies and the passengers. The companies may carry passengers on what terms they please: *Dickson* v. *Great Northern Ry. Co.* (1); *McCawley* v. *Furness Ry. Co.* (2); *Gallin* v. *London and North Western Ry. Co.* (3); *Hall* v. *North Eastern Ry. Co.* (4); *The Stella.* (5) Their position is identical with that of common carriers before the Railway and Canal Traffic Act, 1854, who could and very commonly did limit their liability by special contracts: see *Carr* v. *Lancashire and Yorkshire Ry. Co.* (6) There is nothing at common law to prevent a carrier, whether a common carrier or not, from limiting his liability to any extent he may choose, and it was the common practice for carrying companies to limit their obligations in respect both of passengers and goods until the Legislature intervened and by s. 7 of the Railway and Canal Traffic Act, 1854, enacted that with regard to goods these special contracts should be null and void unless they were adjudged to be just and reasonable. But neither that nor any other Act has prevented carrying companies from limiting their obligations towards passengers. The only condition fettering their choice of the terms on which they will carry passengers is that they shall take reasonable means to bring their terms to the notice of the passenger. In this respect their position is analogous to that of a railway company warehousing their passengers' goods: *Parker* v. *South Eastern Ry. Co.* (7); *Henderson* v. *Stevenson.* (8) In the present case it is not disputed that the plaintiff was fully aware of the terms on which the defendants offered to carry passengers.

Assuming that r. 12 of the Board of Trade Regulations of 1906 is a provision inserted for the benefit of the class of which the plaintiff is a member, yet he may waive the benefit of the provision: *David* v. *Britannic Merthyr Coal Co.* (9); for quilibet

(1) (1886) 18 Q. B. D. 176.
(2) (1872) L. R. 8 Q. B. 57.
(3) (1875) L. R. 10 Q. B. 212.
(4) (1875) L. R. 10 Q. B. 437.
(5) [1900] P. 161.
(6) (1852) 7 Ex. 707.
(7) (1877) 2 C. P. D. 416.
(8) (1875) L. R. 2 H. L. (Sc.) 470.
(9) Ante, p. 146.

renuntiare potest juri pro se introducto: see *Rowbotham* v. *Wilson* (1); *Wilson* v. *McIntosh*. (2)

Simon, K.C., in reply.

Cur. adv. vult.

April 24. LORD COLERIDGE J. read the following judgment:—The plaintiff suffered damage as a passenger while proceeding to a seat on the roof of one of the defendants' cars through coming in contact with a standard which was electrically charged owing to a defect in the electrical conductor, which constituted an admitted breach of regulation No. 12 of the Statutory Rules and Orders, 1906, No. 67, dated January 19, 1906, and made by the Board of Trade. The jury have likewise found that this regulation had not been complied with by the defendants and that the plaintiff had not in fact taken his ticket or paid his fare at the time the accident happened. The plaintiff, however, knew that a special notice to passengers was put up in a conspicuous position in the tramcars to the following effect: "Special notice to passengers.—Passengers are being carried at less than the maximum authorized charges, and every passenger is notified that in consideration thereof a passenger is only carried on the terms that the maximum amount recoverable from the corporation on account of any injury or damages suffered by a passenger and for which the corporation is legally liable is 25*l*. Except as above every passenger travels at his own risk. Passengers can only travel subject to being bound to observe the by-laws for the time being"; and that the tickets contained a statement that they were issued subject to a 25*l*. limit of liability in respect of accidents, and referring to the notice. The jury found for the plaintiff a verdict for 500*l*. damages, and the question is, Can this verdict be sustained?

The maximum toll which the defendants were entitled to demand could not exceed one penny per mile. The defendants, in fact, had a toll which they exacted from all passengers alike of less than one penny per mile, and these tolls they exhibited inside each of the tramcars. They could not in law and did not in fact offer

(1) (1857) 8 E. & B. 123, at p. 151; (1860) 8 H. L. C. 348.
(2) [1894] A. C. 129.

1909

CLARKE v. WEST HAM CORPORATION.

Lord Coleridge J.

any alternative to the toll which they charged, because tolls at no other rate were exhibited in the cars, the exhibition of which was a condition precedent to the right to demand them. The plaintiff knew of the conditions accompanying the tolls, but he had no option. He was bound to travel under the conditions sought to be imposed or not to travel at all. As the plaintiff knew of the conditions, I think it is immaterial whether he had or had not taken his ticket. His legal position seems to me to be the same as if he had. It is settled law that a railway company—and for this purpose a tramway company seems to me to be in a similar position—may under certain circumstances limit their liability. They may, if they please, offer a free pass to a passenger, or permit him to travel under conditions which necessarily involve a greater risk to himself on payment of a lower fare or none, and call upon him to absolve them of their liability in whole or in part: *McCawley* v. *Furness Ry. Co.* (1); *Gallin* v. *London and North Western Ry. Co.* (2); *Hall* v. *North Eastern Ry. Co.* (3); but no case has been decided which permits a railway, canal, or tramway company, which has a duty to serve the public at large in the matter of carriage, to limit their liability without giving the passenger the option to travel at their risk. The defendants in their argument had to admit that if they could limit their liability in this case they must logically claim that they were not bound to carry any one, and, if they did, might carry no one except upon the terms that they should be absolved from all liability whatever. But I think the statutes and regulations which empowered them to lay and work their lines in the public streets forbid such a contention. By 17 & 18 Vict. c. 31, s. 2, which applies to the defendants, they are bound to afford all reasonable facilities for receiving and forwarding traffic. By 33 & 34 Vict. c. 78, s. 41, the defendants were bound to work the tramway on pain of losing their powers. By s. 44 of the North Metropolitan Tramways Act, 1884, they were bound to open for public traffic under a penalty, and I think the legal position of the plaintiff was that he was, under the circumstances of this case, entitled as a member of

(1) L. R. 8 Q. B. 57. (2) L. R. 10 Q. B. 212.
(3) L. R. 10 Q. B. 437.

1909

CLARKE v. WEST HAM CORPORATION.

Lord Coleridge J.

the public to the service of the tramway of the defendants, provided there was room. If that is so, I am of opinion that he was entitled to the service of the tramway at the defendants' risk. Is his position then altered by his knowledge of the conditions under which the defendants claimed to receive him as a passenger? Prima facie where damage has accrued to a person through the breach of a statutory duty of another person the latter is liable. But it has recently been held that you may waive the breach of a statutory duty, and that, for instance, a workman may waive the performance by his employers of a statutory duty towards him by accepting employment under them: *David* v. *Britannic Merthyr Coal Co.* (1) The distinction between that case and this seems to me to be that in that case the workman has no right to enter into his master's service; it is a voluntary act on his part. But where the person injured has a right to place himself in a position where the breach of a statutory duty is the cause of injury to himself, the party upon whom the duty devolves cannot fetter that right by placing limitations upon the liability which follows from the breach of that duty. On these grounds I give judgment for the plaintiff for 500*l.*

W. H. G.

The defendants appealed. The appeal came on for hearing on July 15, 1909.

Danckwerts, K.C., and *Morten, K.C.*, for the defendants. There is nothing in any of the North Metropolitan Tramways Acts or in the Tramways Act, 1870, or in the West Ham Corporation Act, 1898, to compel either the tramway company or the defendants as their assigns to carry passengers except workmen, and this plaintiff was an ordinary passenger travelling in an ordinary tramcar: see North Metropolitan Tramways Act, 1884, ss. 4, 44, 50; Tramways Act, 1870, ss. 34, 41; West Ham Corporation Act, 1898, ss. 6, 8. Lord Coleridge J. has held that the defendants were bound to carry any member of the public who applied, provided there was room for him in the tramcar, and he relied upon the provisions of the Railway and Canal Traffic Act, 1854; but that

(1) Ante, p. 146.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Act does not apply—*Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1); *Denaby Main Colliery Co., Ld.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (2)—and the reasoning of the learned judge falls to the ground. It has been held for fifty years past that a railway or steamship company, unless prohibited by statute from doing so, can limit by contract their liability towards the passengers they carry, and it is not necessary that the passenger should have read the condition containing the limitation of liability if it has been fully advertised: *Stewart* v. *London and North Western Ry. Co.* (3); *McCawley* v. *Furness Ry. Co.* (4); *Hall* v. *North Eastern Ry. Co.* (5); *The Stella* (6); *Burke* v. *South Eastern Ry. Co.* (7); *Parker* v. *South Eastern Ry. Co.* (8); *Flower* v. *London and North Western Ry. Co.* (9); *Stirling* v. *London and South Western Ry. Co.* (10); *Richardson, Spence & Co. and "Lord Gough" Steamship Co.* v. *Rowntree* (11); *Henderson* v. *Stevenson* (12); *The Duero.* (13)

The defendants are not common carriers. At common law a common carrier is only a carrier of goods; no one can be a common carrier of passengers in the sense of being obliged to carry any one who chooses to come, and any company may make a bargain with their passengers as to the terms on which they shall be carried. The defendants are therefore under no liability to the plaintiff beyond the 25*l.*

Simon, K.C., Edmond Browne, and *Elkin,* for the plaintiff. There may be a common carrier of passengers in the sense that a man who holds himself out as a public carrier is bound to carry all who come. If the question is whether a carrier is an insurer, it is quite true that by the custom of the realm that applies only to a carrier of goods. That is due to the necessities of the case. But if a man holds himself out as a public carrier of passengers he must carry all who come, provided there is accommodation for

(1) [1892] 1 Q. B. 357.
(2) (1885) 11 App. Cas. 97, 121.
(3) (1864) 3 H. & C. 135.
(4) L. R. 8 Q. B. 57.
(5) L. R. 10 Q. B. 437.
(6) [1900] P. 161.
(7) (1879) 5 C. P. D. 1.
(8) 2 C. P. D. 416.
(9) [1894] 2 Q. B. 65.
(10) (1895) 12 Times L. R. 69.
(11) [1894] A. C. 217.
(12) L. R. 2 H. L. (Sc.) 470.
(13) (1869) L. R. 2 A. & E. 393.

them. There is a duty upon him to carry. A fortiori a statutory body created for the very purpose of carrying passengers is under a duty to carry.

[KENNEDY L.J. referred to *Benett* v. *Peninsular and Oriental Steamboat Co.* (1) and to Bullen and Leake, 3rd ed. p. 134.]

The tramway company and the defendants as their statutory assignees being under a duty to carry all who come, they cannot limit and in substance abrogate the performance of that duty by imposing conditions restricting the rights of the passengers. Where you have a statutory undertaking, such as a tramway, a railway, or a canal, which comes into being for the very purpose of serving the public, there is an implied obligation on the undertakers, when they have completed their arrangements, to serve. It is not contended that the defendants are bound to keep the tramway open, but so long as the tramway is open for public traffic any passenger can claim to be carried. The effect of the whole of the statutes applicable to this case is that there is a statutory profession put upon the undertaking to carry passengers: see North Metropolitan Tramways Act, 1884, ss. 4, 20, 44, 48, 50, 55; North Metropolitan Tramways Act, 1869, ss. 68, 70, 71, 72, 73; North Metropolitan Tramways Act, 1870, s. 34; Tramways Act, 1870, ss. 35, 41, 42, 45, 46, 53, 55. The statutes define the terms of the bargain between the undertakers and the public, and it is not competent to the undertakers to refuse to carry passengers except upon the terms that they will not be responsible for their safety, inasmuch as that is altering the whole nature of the relation between themselves and the public: *Stourbridge Canal Co.* v. *Wheeley.* (2) Further, there was here no consideration for the condition limiting the defendants' liability. The defendants were only entitled to charge the fares appearing on the list of fares, and it is immaterial that these fares were not the maximum fares which they might have charged under their statutes: *Gregson* v. *Potter.* (3) The plaintiff was not offered the option of paying the maximum fare without any limitation of the defendants' liability and a lower fare subject to such a limitation, but he is told, You come on this tramcar at

(1) (1848) 6 C. B. 775. (2) (1831) 2 B. & Ad. 792.
(3) 4 Ex. D. 142.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

your peril and the terms are that we will not be liable for more than 25*l*. That distinguishes this case from all the cases in which it has been held that a railway company may carry a passenger at a reduced fare subject to a condition limiting the company's liability. Lastly, there is an admitted breach of the Board of Trade Regulations, on the terms of complying with which alone the defendants are entitled to use electricity, and any attempt to contract out of those regulations must fail.

Danckwerts, K.C., in reply. Although a company cannot get rid of a statutory duty, yet any individual right to damages may be waived or renounced unless the statute provides the contrary. *Rumsey* v. *North Eastern Ry. Co.* (1), *Rowbotham* v. *Wilson* (2), *David* v. *Britannic Merthyr Coal Co.* (3), and the cases cited in the opening are illustrations of special bargains of this kind made between a carrying company and its passengers.

The passage referred to by Kennedy L.J. in Bullen and Leake to the effect that a carrier of passengers is bound to carry all who come is not supported by the authority cited in support of it, namely, *Birkett* v. *Whitehaven Junction Ry. Co.* (4), because the point was not there raised or decided, and the same observation applies to *Benett* v. *Peninsular and Oriental Steamboat Co.* (5)

[FARWELL L.J. referred to *Bretherton* v. *Wood*. (6)

KENNEDY L.J. In Roscoe's Nisi Prius, 18th ed. p. 653, there is a passage which is in your favour. It says: "There does not appear to be any obligation, apart from contract, on a passenger carrier to receive passengers, even though there is adequate accommodation."]

The difference between the carriage of goods and the carriage of passengers is pointed out in *Christie* v. *Griggs* (7) and in *Aston* v. *Heaven*. (8)

As regards the question of consideration, the defendants could exact the full fare, although, no doubt, they could not exact more than the published fare until they put up a fresh notice; but the consideration is that they will not put themselves in a

(1) (1863) 14 C. B. (N.S.) 641, 649.
(2) 8 E. & B. 123, 151.
(3) Ante, p. 146.
(4) (1859) 4 H. & N. 730.
(5) 6 C. B. 775.
(6) (1821) 3 Brod. & B. 54.
(7) (1809) 2 Camp. 79.
(8) (1797) 2 Esp. 533.

position to charge the full fare. [He also referred to *McManus* v. *Lancashire and Yorkshire Ry. Co.* (1)]

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Cur. adv. vult.

July 30. COZENS-HARDY M.R. This appeal raises an important question, whether the West Ham Corporation can by notice limit their liability to pay damages to the plaintiff for an accident due to their negligence. It is necessary to consider with care the precise position of the defendants with reference to passengers carried on their tramcars. Now the defendants claim as statutory assignees of the undertaking of the North Metropolitan Tramways Company. By the Act of 1869, which incorporated that company, power was given to the company to make and maintain certain street tramways. The Act recited that the laying down of these tramways would be of great local and public advantage. By s. 67 the company were authorized to demand tolls from every passenger travelling not exceeding one penny per mile. By s. 68 every passenger travelling upon the tramways might take his personal luggage, not exceeding a certain weight, free of charge. By s. 70 the company were not to be bound to carry, unless they should think fit, any articles other than such passengers' luggage, a section which seems to me to imply an obligation to carry passengers and passengers' luggage. By s. 71 a list of all authorized tolls which should be exacted by the company has to be exhibited on the inside of every carriage. This section seems plainly to indicate that they cannot exact the maximum authorized toll if they put up inside their carriages only a smaller toll. By the North Metropolitan Tramways Act, 1870, s. 34, the company were required at all times after the opening of the tramways for traffic to run certain workmen's trams at cheaper fares to be fixed by the Board of Trade. This section seems to me to imply an obligation to carry passengers, with a superadded obligation, if the Board of Trade so direct, to carry workmen at special rates at special hours. By the North Metropolitan Tramways Act, 1884, the company were authorized to make and maintain certain further tramways, including the Barking Road line, and by s. 44 a penalty was

(1) (1859) 4 H. & N. 327.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Cozens-Hardy M.R.

imposed if the tramways were not complete and open for public traffic within a certain period, and by s. 48 the sections of the Acts of 1869 and 1870 to which I have referred were incorporated with the Act and extended and applied to the tramways authorized by the Act, and by s. 50 the company were not to demand or take from any passenger travelling on the Barking Road line any greater sum than one penny. I should say that the accident to the plaintiff took place on the Barking Road line. These Acts incorporate certain general provisions of the Tramways Act of 1870. It seems to me that the provisions of that statute plainly indicate that the tramways are not for the mere private benefit of the undertakers, but are for the public benefit. I refer especially to s. 35, s. 42, and s. 46, and I think s. 53 may be relied upon as implying a duty to carry passengers who desire to travel without any luggage.

By the West Ham Corporation Act, 1898, the West Ham Corporation were authorized to purchase the tramways of the North Metropolitan Tramways Company within the borough, and to exercise all powers possessed by that company, and, in addition, they were authorized to use electrical power subject to certain regulations contained in s. 8. It is not necessary to consider further in detail the provisions of the several Acts relating to the West Ham Corporation. Suffice it to say that they have acquired the tramway line on which the accident occurred and that the tramways have been open for public traffic for a considerable time. The charges made by the defendants for a portion of the Barking Road line, to which this action relates, are less than the maximum which they might charge. The only charge printed on the inside of the car for the distance travelled by the plaintiff was one halfpenny, but they insert inside their carriages a special notice in the following terms: [The Master of the Rolls read it.] It is admitted that the plaintiff was aware of this notice. The plaintiff was seriously injured by reason of an electrical shock due to the negligence of the defendants. The jury awarded 500*l.* damages, and the learned judge, after argument, ordered judgment to be entered for that sum, and declined to give effect to the contention of the defendants that a sum of 25*l.* paid into Court by the defendants was all that the plaintiff could claim.

In these circumstances the first and the main point to be considered is this. Is there an obligation upon the defendants, so long as the tramways are being worked, to carry a member of the public, not being an objectionable person within the meaning of by-law 4, who desires to enter a car in which there is a vacant place, or are the defendants under no such obligation, but at liberty to refuse to take any one except upon such conditions as the defendants think fit to impose? In my opinion there is such an obligation upon the defendants, or, in other words, the plaintiff had a right, on paying or offering to pay his fare, to travel in the tramcar. It is quite true that this obligation is not imposed in clear and express terms, but I cannot think that the sections to which I have referred admit of any other conclusion than this. The undertakers were empowered to do that which would otherwise have been a nuisance—to lay rails along the highway. It was in the nature of a franchise granted by Parliament. The analogy of a ferry seems to me to be close. In the language of Holt C.J. in *Payne* v. *Partridge* (1), "there being an ancient ferry, all the King's people are intitled to pass of common right." Parliament has allowed the levying of tolls, which again seems to me to negative the idea that the defendants can pick and choose their passengers. Moreover, the by-laws, which have statutory effect, strongly support this view. If I am correct in this view, it follows that the right conferred upon the plaintiff was a right to be carried on payment of the published fare, namely, one halfpenny, and that there was no justification for qualifying the plaintiff's right by the addition of a term limiting liability for negligence to 25*l*. It may be, though I hesitate without further argument to so hold, that if the defendants had chosen to publish two lists of fares in their carriages, one of which contained their maximum rates and the other of which contained reduced rates, and an option were given to a passenger to pay either the full rate without any limitation of liability or the reduced rate with a limitation of liability, a passenger electing to pay the smaller fare would be bound by the terms on which, and on which alone, the reduced rate was accepted. In that case there might be consideration for the

(1) (1690) 1 Show. 255, 257.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Cozens-Hardy M.R.

limitation of liability, but in the present case it seems to me that no option was given to the plaintiff. The plaintiff had paid the only fare which the defendants could demand, and the defendants were no more entitled to limit their liability to 25*l.* than they would be to negative all liability for negligence.

In my opinion it is not useful to refer to provisions contained in the Railway Acts or to cases decided under those Acts. I base my judgment on the simple proposition that the plaintiff, who had a right to be conveyed in a tramcar on payment of the published fare, enjoyed that right with everything incidental to it, including a right to such damages as a jury might assess by reason of the defendants' negligence. I think that the appeal fails and must be dismissed with costs.

FARWELL L.J. The defendants are the owners of a tramway in West Ham which was constructed under statutory powers and which has been used by them for the carriage of passengers for several years. The question in this case is whether the defendants are entitled to impose the conditions already read by the Master of the Rolls without giving the passengers the option of travelling at a higher fare without such conditions. The maximum fare allowed to be charged for the journey in question being one penny, is it lawful to refuse to carry any passenger otherwise unobjectionable, and when there is room in the trams, except for a halfpenny with a condition limiting liability, without giving him the option of being carried unconditionally at a higher fare within the maximum? The various statutes which gave the defendants and their predecessors in title the necessary powers to make and maintain their trams do not contain any express provisions compelling them to carry passengers on any particular terms, except that the maximum fare should not exceed a certain sum, and I feel some difficulty in reading by implication into the statutes provisions compelling them to carry in the same way as if they were common carriers unless they are in fact and in law common carriers. The question, therefore, in my opinion, arises whether the defendants are or are not common carriers of passengers. It is contended that carriers of passengers only are not common carriers at all, and that none of the

liabilities of common carriers attach to them. I am of opinion that this is not correct. A common carrier of goods comes under two distinct duties or liabilities: he is liable to carry according to his profession, and he is also liable as bailee of chattels under the fifth head in *Coggs* v. *Bernard* (1) (locatio operis faciendi); it is as bailee that his liability as insurer arises, binding him to answer for the goods delivered to him at all events. A carrier of passengers comes under the first duty or liability, and for the same reason, namely, that he is bound to carry according to his profession. But he is not liable under the other head because he is not a bailee: bailment is confined to chattels and does not extend to human beings. The carrier of passengers is free from liability as an insurer, not because he is not a common carrier, but because, although a common carrier, he is not a bailee of his passengers. This is apparent from the judgment of the Exchequer Chamber delivered by Sir M. Smith in *Readhead* v. *Midland Ry. Co.* (2), where he says: "The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carriers to redeliver the goods in a sound state can attach only in the case of goods." . . . . "The liability of the common carrier of goods attached upon a particular bailment of the goods to him in his capacity of common carrier, and the rules that govern the rights of bailors or bailees of things, are of course only applicable to things capable of bailment." It will be observed that the learned judge treats common carriers of passengers as well as of goods as having been known to the law from the earliest times; and when I turn to the basis on which their first duty, namely, of carrying according to their public profession, is founded, it is apparent that it applies as much to carriers of passengers as of goods. The law is thus stated by Holt C.J. in *Lane* v. *Cotton* (3), cited with approval by Parke B. in *Johnson* v. *Midland Ry. Co.* (4): "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eoipso

(1) (1703) 2 Ld. Raym. 909; 1 Sm. L. C., 11th ed., 173.

(2) (1869) L. R. 4 Q. B. 379, at p. 382.

(3) (1701) 12 Mod. 472, at p. 484.

(4) (1849) 4 Ex. 367, at p. 372.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Farwell L.J.

bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." The principle here stated by Holt C.J. and repeated in numerous cases since, that the obligation of a person who takes on himself a public trust for the benefit of his fellow-subjects is to carry according to his profession, applies with peculiar force to the case of undertakers who on the faith of their profession of readiness so to serve ask for and obtain parliamentary powers. The defendants were bound to make and open for public traffic within a certain time: having done so, they are bound, in my opinion, to accept the public as passengers on the same conditions and in the same way as common carriers are so bound; that is to say, adapting to carriers of passengers what was said as to carriers of goods by Cockburn C.J. in *Garton* v. *Bristol and Exeter Ry. Co.* (1), persons holding themselves out to the world as common carriers are bound to act as such in respect to all persons not in an unfit condition for whom they have accommodation, on having tendered to them the legal fare, without subjecting the person tendering to any unreasonable condition. This status of carriers of passengers as common carriers is not only recognized in *Readhead* v. *Midland Ry. Co.* (2), but is the ground of the decision of the Exchequer Chamber in *Bretherton* v. *Wood.* (3) The action there was against ten persons as proprietors of a coach for negligence. A verdict was found against eight and in favour of two. If it was an action on contract, the liability was joint, and the verdict would have been set aside; but it was supported on the ground that the liability was several, because it was an action on the case against a common carrier on whom the duty was cast not by contract, but by the custom or common law of England. The duty in that case was not the same as in this, but was a duty to carry with due care; but the importance of the decision for the present purpose is that it affirms the existence of common carriers of passengers at common law, and when it has once been determined that such is their position, then all the provisions which by law affect common carriers of

(1) (1861) 1 B. & S. 112, at p. 162. (2) L. R. 4 Q. B. 379, at p. 382.
(3) 3 Brod. & B. 54.

goods, not as bailees, but as carriers by reason of their public profession, are equally applicable to carriers of passengers mutatis mutandis. This is in accordance with the law in America. Story on Bailments, s. 591, thus states the duties of passenger carriers on land: "The first and most general obligation on their part is to carry passengers whenever they offer themselves and are ready to pay for their transportation. This results from their setting themselves up, like innkeepers, and common carriers of goods, for a common public employment on hire. They are no more at liberty to refuse a passenger, if they have sufficient room and accommodation, than an innkeeper is to refuse suitable room and accommodations to a guest." Angell on Carriers, s. 525, is to the same effect. The cases cited by the appellants were all decisions that common carriers of passengers are not liable as insurers, but only for negligence: none of these had any bearing on the question of the extent and nature of the duties of carriers of passengers by reason of their public profession, nor do any of them suggest that common carriers of passengers are unknown to the law.

The defendants being then, in my opinion, common law carriers of passengers, the next question is, what is the effect of their notice on the tickets and in their trams? I am of opinion that the condition is illegal when no alternative is offered. A common carrier may no doubt impose reasonable conditions, and the question whether they are reasonable or not must depend on the facts of the particular case; but he is not at liberty to refuse to carry altogether when he has room and the passenger is unobjectionable and tenders his fare, which in the absence of a statutory maximum is a reasonable sum, for if the carrier were at liberty to exact what sum he pleased the duty would be rendered nugatory. Nor when he is bound by a statutory maximum fare is he at liberty to impose conditions relieving himself from the ordinary consequences of negligence without giving the passenger an option of travelling without such conditions. The maximum fare allowed by the Act entitles the passenger to travel with the benefit of all the liabilities attaching by law to the carrier unless the Act in terms relieves him of them; any condition limiting that benefit is a limitation on the advantages for the full enjoyment of

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Farwell L.J.

which he has paid all that the carrier is entitled to demand. As at present advised, I think that it is competent for the carrier to make a bargain with the passenger by which, in consideration of the acceptance by the carrier of a fare smaller than the statutory maximum, the liability of the carrier is limited; but it must be a contract which the passenger is free to accept or reject, and, if rejected, the passenger must have the option to travel, at any rate, at the maximum rate. Subject to the qualifications stated above, the carrier is bound to carry any passenger who tenders the maximum rate; he cannot escape from this liability by alleging his willingness to carry on other terms not accepted by the passenger, and he cannot force such terms on the passenger by refusing to carry on any other.

I am therefore of opinion that this appeal fails and should be dismissed with costs.

KENNEDY L.J. In this case the defendants admit liability in damages to the extent of 25*l.* in respect of a severe injury suffered by the plaintiff through the defendants' negligence or default whilst he was being carried as a passenger on one of the defendants' electrically driven tramcars in the West Ham district. The common jury, at the trial of the action before Lord Coleridge J., assessed the damages at 500*l.*, and the learned judge on further consideration has entered judgment for the plaintiff for that amount. The defendants' contention on this appeal is that, as a matter of law, and by virtue of the contract of carriage, their liability is limited to 25*l.*

I think that the conclusion at which the learned judge arrived in favour of the plaintiff was right, and that this appeal should be dismissed.

The defendants have acquired and work the tramway system with statutory powers and under statutory restrictions and regulations. There is by statute a scale of maximum tolls: the tolls authorized and actually exacted for each journey must be exhibited conspicuously in each car in use. In the car in which the plaintiff travelled this enactment was complied with, the fare for his journey being one halfpenny. But there was also exhibited on the same placard a special notice to passengers in the following

terms: [The Lord Justice read it.] There is no doubt that the plaintiff when he entered the car knew of this notice, and the defendants' case is that he cannot recover more than 25*l.* in respect of the injury caused by their negligence or default, because he must be taken to have been received as a passenger upon the terms of this notice.

In my opinion this contention is not well founded. If there is room in the car and the member of the public who presents himself for admission is not reasonably objectionable on the ground of his personal condition, and is ready and willing to pay the toll exhibited in the car as the fare which the defendants actually exact and to comply with the by-laws, the defendants are, in my opinion, bound to admit such person to the tramcar and to carry him therein as a passenger in consideration of the payment of that toll, and are not entitled to exact from him the acceptance of any other or further conditions. Nor does such person, because he knows of the notice as to limitation of liability in the case of injury through the defendants' negligence, waive his legal right. What is the position of the defendants? It is in my judgment the proper inference from the language of the statutes that the defendants are in the conduct of this tramway traffic "common" or "public," or, as Montague Smith J., in delivering the judgment of the Exchequer Chamber in *Readhead* v. *Midland Ry. Co.* (1), described the railway company in that case, "general" carriers of passengers for hire. The North Metropolitan Tramways Act, 1869, s. 67, speaks of the "opening for public traffic of any of the tramways by this Act authorized." By s. 68, "Every passenger travelling upon the tramways may take with him his personal luggage, not exceeding twenty-eight pounds in weight, without any charge being made for the carriage thereof." The Tramways Act, 1870, s. 35, provides for action on the part of the Board of Trade "if the public are deprived of the full benefit of the tramway." The North Metropolitan Tramways Act, 1884, s. 44, enacts a penalty if any of the tramways are not completed within the time limited by the Act for every day "until the said tramways are

(1) L. R. 4 Q. B. 379, at p. 381.

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Kennedy L.J.

completed and opened for public traffic." All these statutes apply to the defendants' undertaking.

Now apart from statute the common, public, or general carrier of passengers, that is to say the person who is engaged in the trade of carrying passengers as a regular business and who holds himself out, or advertises himself, as ready to carry between places on a certain route all persons indifferently who accept his published terms (including the fare tariff), is not at liberty arbitrarily to reject a passenger who presents himself at a proper time and place and is ready and willing to accept those terms. "The distinction between a public or common carrier of persons and a private or special carrier of the same, is, that it is the duty of the former to receive all persons who apply for a passage." That is a quotation from Angell on the Law of Carriers, 5th ed. s. 524, and in s. 525 the same writer says: "It is in fact beyond all doubt, that the first and most general obligation on the part of public carriers of passengers, whether by land or water, is to carry persons who apply for a passage." So also in Bullen and Leake, 3rd ed. p. 134, in a note summing up the law it is written: "The duty of a carrier of passengers is to carry all passengers who offer themselves in a fit and proper state to be carried, provided the carrier has convenience to carry them, and the passengers are ready and willing to pay the proper and reasonable fare." It may be the law, and I am inclined to think it is in regard to "common" or "public" or "general" carriers of passengers, as it certainly is in the case of such carriers of goods (see the opinion of Lord Blackburn in the case of *Great Western Ry. Co.* v. *Sutton* (1)), that they are bound to exact no more than a reasonable compensation for their service. But at all events, if the carrier holds himself out to the public as ready to carry passengers upon published terms, such a carrier of passengers cannot arbitrarily refuse to admit a passenger who presents himself for conveyance on those published terms and is ready to comply with them. The case is analogous to that of an advertiser whose offer by advertisement to contract has been accepted by one of the public. The acceptor thereupon becomes entitled to

(1) (1869) L. R. 4 H. L. at p. 237.

claim performance of the advertiser's offer. In the case of the defendants, the Legislature, which has authorized them to ply for reward as public carriers of passengers along the tramway route and given them, to the disadvantage and hindrance of other carriers, a special right of user of the highway in order to enable them to fulfil that public purpose, has, in my judgment, by compelling the defendants to exhibit a statutory tariff conspicuously within each car, and enacting a maximum toll, fixed the terms upon which the defendants as public carriers may insist for the conveyance of a passenger, and has given the right to travel upon those terms.

What the defendants seek to do, as it appears to me, is to demand from the plaintiff, one of the public, who at the proper time and place claimed and obtained the position of a passenger, adherence to a contract not authorized by the governing statutes and involving a new and additional term of an onerous nature beyond the payment of the toll, namely, the surrender of the plaintiff's common law right to full compensation for injury if caused by the neglect of the defendants to perform their duty as carriers of passengers, which is to use reasonable care and skill in carrying him on his journey. I think that they could not, in conformity with the legislation which governs them as public carriers, insist upon the acceptance by the plaintiff of any such conditions, and that his knowledge when he entered the tramcar that the defendants claimed to exact from him in addition to the statutory toll the acceptance of such a term cannot be used by the defendants as an act waiving his right to be carried upon the statutory terms, namely, the payment of the conspicuously exhibited fare and obedience to the by-laws in force. If the view which I have expressed as to the effect of the statutes is a sound view, no question of "reasonableness" arises. But if it were necessary or relevant to consider the question of reasonableness, I think that the proposed contract would be clearly unreasonable. The defendants, as appears from the terms of the "special notice," justify the exaction of the surrender of the right to claim damages beyond 25*l.* upon the ground that the defendants have chosen not to exact the maximum permissible toll. This, as it seems to me, is no ground at all. There is in

C. A. 1909

CLARKE v. WEST HAM CORPORATION.

Kennedy L.J.

fact no option given to the passenger to pay a higher toll and retain fully his common law right to damages. No such alternative appears in the conspicuously exhibited tolls. No such alternative is in fact offered to any passenger.

In my view, for these reasons, the judgment of Lord Coleridge J. is right. But I think I ought to add that I do not concur in one passage of the judgment in which the judge appears, if he is correctly reported and if I correctly understand him, to have thought that the railway legislation had some application to this case. It appears to me to have no connection with the legal position of the owners of these tramways under special statutes.

Appeal dismissed.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitors for defendants: *Hillearys.*

H. B. H.

1909
July 3, 12.

THE RIGHT HONOURABLE JOHN ALLEN, BARON LLANGATTOCK *v.* WATNEY, COMBE, REID & CO., LIMITED.

Licensing Acts—Compensation—Charge on renewed Licences—Deduction from Rent—Unexpired Term—Successive Leases—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3; *Sched. II.*

By s. 3, sub-s. 1, of the Licensing Act, 1904, quarter sessions are directed, when necessary, to impose in respect of all existing on licences renewed in respect of premises within their area charges at the rates specified. By sub-s. 3 such deductions from rent as are set out in Sched. II. to the Act may be made by any licence-holder who pays a charge under the section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By Sched. II. to the Act a person whose unexpired term does not exceed two years may deduct a sum equal to 88 per cent. of the charge, and a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge.

The defendants were lessees of a public-house under a lease which expired at Christmas, 1909; they were also grantees of a lease of the same public-house for a term commencing from the day but one next after the date of the expiration or sooner determination of the aforesaid

lease and enduring until Midsummer, 1935. Quarter sessions having in the year 1908 imposed a charge in respect of the public-house under s. 3 of the Act:—

Held, that the unexpired term of the defendants included the reversionary lease as well as the lease in possession, and that they were persons whose unexpired term exceeded twenty-five but did not exceed thirty years, and that they were consequently entitled to deduct 7 per cent. and no more of the charge.

THIS action was commenced on March 12, 1909, by a writ of summons whereby the plaintiff claimed the sum of 16*l.* 18*s.* as due to the plaintiff from the defendants for one quarter's rent of the Queen public-house, Camberwell, due on December 25, 1908, after deducting income tax under Sched. A and the proportion of the compensation charge payable under the Licensing Act, 1904; and the sum of 20*l.* 19*s.* for one quarter's rent of the Roebuck public-house, Walworth, due on December 25, 1908, after deducting income tax and the proportion of the said compensation charge.

The parties concurred in stating the questions of law arising therein in the following case for the opinion of the Court:—

1. The plaintiff is the tenant for life and entitled to receive the rents of two fully-licensed public-houses known respectively as the Queen, Camberwell, and the Roebuck, Walworth, both in the county of London, and the defendants are lessees (or assignees of leases) thereof under the indentures hereinafter mentioned, which indentures are deemed to form part of the case.

2. The action is brought to recover the sum of 16*l.* 18*s.* alleged to be due to the plaintiff in respect of one quarter's rent of the said Queen public-house on December 25, 1908, and the further sum of 20*l.* 19*s.* alleged to be due to the plaintiff at the same date in respect of one quarter's rent of the said Roebuck public-house.

3. By an indenture of lease dated January 23, 1880, and made between the plaintiff of the one part and James Watney of the other part, the said Queen public-house was demised to the said James Watney at the yearly rent of 80*l.*, payable quarterly, for the term of thirty-one years from December 25,

1909

LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & CO., LIMITED.

1878, expiring on December 25, 1909. The said lease is now vested in the defendants by assignment dated January 14, 1899.

4. By an indenture dated August 2, 1895, and made between the plaintiff and John Maclean Rolls (hereinafter called the lessors) of the one part and Watney & Co., Limited, of the other part, the lessors in consideration of the sum of 900*l.* then paid to the lessors granted to the said Watney & Co., Limited, a reversionary lease of the said Queen public-house at the yearly rent of 80*l.* for a term of years commencing from the day but one next after the date of the expiration or sooner determination of the said indenture of lease of January 23, 1880, and enduring until June 24, 1935. The said reversionary lease is now vested in the defendants by assignment dated July 12, 1899.

5. By an indenture of lease dated August 18, 1887, and made between the plaintiff of the one part and Robart Henchley of the other part, the said Roebuck public-house was demised to the said Robart Henchley at the yearly rent of 100*l.*, payable quarterly, for the term of thirty-one years from December 25, 1886, expiring on December 25, 1917. The said lease is now vested in the defendants by assignment dated January 14, 1899.

6. By an indenture dated August 2, 1895, and made between the plaintiff and John Maclean Rolls of the one part and Watney & Co., Limited, of the other part, the plaintiff and the said John Maclean Rolls in consideration of the sum of 500*l.* then paid to them granted to the said Watney & Co., Limited, a reversionary lease of the said Roebuck public-house at the yearly rent of 100*l.* for a term of years commencing from the day but one next after the date of the expiration or sooner determination of the said indenture of lease dated August 18, 1887, and enduring until June 24, 1935. The said reversionary lease is now vested in the defendants by assignment dated January 14, 1899.

7. The said Queen and Roebuck public-houses respectively were in the year 1908 and at all material times occupied by tenants of the defendants, which tenants respectively were the

holders of the licences granted in respect of the said public-houses respectively.

8. The Licensing Act, 1904, by s. 3 empowers the quarter sessions to impose certain charges (hereinafter called "compensation charges") upon all existing on licences renewed in respect of premises within their area, and by sub-s. 3 of the said section such deductions from rent as are set out in the Second Schedule to the said Act may be made by any licence-holder who pays a charge under the said section and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By the scale of deductions contained in the said Second Schedule to the said Act, so far as is material to this case, it is provided as follows: A person whose unexpired term does not exceed one year may deduct a sum equal to 100 per cent. of the charge; a person whose unexpired term does not exceed two years may deduct a sum equal to 88 per cent. of the charge; a person whose unexpired term does not exceed three years may deduct a sum equal to 82 per cent. of the charge; . . . . a person whose unexpired term does not exceed ten years may deduct a sum equal to 45 per cent. of the charge; . . . . a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge. . . . .

9. In the year 1908 the quarter sessions for the county of London comprising the licensing division of Newington, in which division the two public-houses are situate, under and by virtue of s. 3 of the Licensing Act, 1904, imposed in respect of the said Queen public-house a compensation charge of 30*l.* and imposed in respect of the said Roebuck public-house a compensation charge of 40*l.* The said compensation charges were in or about the month of October, 1908, duly paid by the licence-holders of the said public-houses respectively, and the said licence-holders made such deductions from their respective rents paid by them to the defendants and payable on December 25, 1908, as are authorized by s. 3 and the Second Schedule of and to the said Act.

10. The plaintiff admits that the defendants are entitled to deduct from the rents due from them to the plaintiff on

1909

LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & CO., LIMITED.

December 25, 1908, certain percentages of the said compensation charges imposed upon the said public-houses respectively, but contends that under the scale contained in the Second Schedule to the Licensing Act, 1904, the defendants are entitled to deduct 7 per cent. of the said charges and no more on the ground that they are persons "whose unexpired term exceeds twenty-five but does not exceed thirty years" within the meaning of the said schedule.

11. The defendants contend (1.) that in respect of the said Queen public-house they are entitled to deduct from the rent due to the plaintiff as aforesaid 88 per cent. of the said compensation charge of 30*l.* on the ground that they are persons "whose unexpired term does not exceed two years" within the meaning of the said schedule; and (2.) that in respect of the said Roebuck public-house they are entitled to deduct from the rent due to the plaintiff as aforesaid 45 per cent. of the said compensation charge of 40*l.* on the ground that they are persons "whose unexpired term does not exceed ten years" within the meaning of the said schedule.

12. The effect of the respective contentions of the plaintiff and defendants appears from the following table:—

THE QUEEN PUBLIC-HOUSE.

Plaintiff's Claim.				*Defendants' Contention.*			
Deductions calculated on basis of term expiring June 24, 1935.				Deductions calculated on basis of term expiring December 25, 1909.			
	£	*s.*	*d.*		£	*s.*	*d.*
Quarter's rent due to plaintiff at Christmas, 1908	20	0	0	Quarter's rent due to plaintiff at Christmas, 1908	20	0	0
Less income tax under Sched. A . . .	1	0	0	Less income tax under Sched. A . . .	1	0	0
	19	0	0		19	0	0
Deduct 7 per cent. of compensation charge (30*l.*)	2	2	0	Deduct 88 per cent. of compensation charge (30*l.*)	26	8	0
Net amount claimed by plaintiff . . .	16	18	0	Net amount deductible by defendants as against future rent . . .	7	8	0

THE ROEBUCK PUBLIC-HOUSE.

Plaintiff's Claim.				*Defendants' Contention.*			
Deductions calculated on basis of term expiring June 24, 1935.				Deductions calculated on basis of term expiring December 25, 1917.			
	£	s.	d.		£	s.	d.
Quarter's rent due to plaintiff at Christmas, 1908	25	0	0	Quarter's rent due to plaintiff at Christmas, 1908	25	0	0
Less income tax under Sched. A . . .	1	5	0	Less income tax under Sched. A . . .	1	5	0
	23	15	0		23	15	0
Deduct 7 per cent. of compensation charge (40*l.*)	2	16	0	Deduct 45 per cent. of compensation charge (40*l.*)	18	0	0
Net amount claimed by plaintiff . . .	20	19	0	Net amount due to plaintiff . . .	5	15	0

13. The defendants admit that if the plaintiff's contention is correct in point of law the amounts claimed by him in respect of the rents payable in respect of the two public-houses are due to him as rents of the said public-houses and have been duly demanded and have not been paid, and that if the defendants' contention is correct in point of law the sum of 5*l.* 15*s.* is due to the plaintiff in respect of rent for the Roebuck public-house and that the said sum has not been paid.

14. The plaintiff admits that if the defendants' contention is correct in point of law the sums shewn as deductions from the said rents payable in respect of the said two public-houses and claimed by the defendants are correct in amount.

15. The question for the opinion of the Court is whether on the facts hereinbefore stated the plaintiff's contentions set out in paragraph 10 or the defendants' contentions set out in paragraph 11 hereof are correct in law.

16. If the Court shall be of opinion that the plaintiff's contentions are correct, then judgment is to be entered for the plaintiff for the full amounts claimed, namely, 16*l.* 18*s.* for rent of the Queen public-house and 20*l.* 19*s.* for rent of the Roebuck public-house, such rents being due on December 25, 1908, and, subject to the opinion of the Court costs of the said action.

1909

LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & CO., LIMITED.

17. If the Court shall be of opinion that the defendants' contentions are correct in law, then judgment is to be entered for the plaintiff for the sum of 5*l.* 15*s.* for rent of the Roebuck public-house due on December 25, 1908, and, subject to the opinion of the Court, the defendants' costs of defence to the said action.

Macmorran, K.C. (*Ryde* and *Konstam* with him), for the plaintiff. By s. 3, sub-s. 3, of the Licensing Act, 1904, such deductions from rent as are set out in the Second Schedule to the Act may be made by the licence-holder and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By Sched. II. a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge. The question in this case is whether the defendants are persons whose "unexpired term" exceeds twenty-five years, &c. The word "term" in this enactment means the interest of the person in the premises. It is not a word of art, as it might be if used in a statute concerning the law of real property. There is authority for construing the word "term" in the less technical sense: see *Reg.* v. *Vestry of St. Marylebone.* (1) That was a case under the Artizans and Labourers Dwellings Act, 1868 (31 & 32 Vict. c. 130); by various sections of that Act notices are to be served on the "owner" of premises dealt with under the Act. By s. 3 of the Act "owner" is to include all lessees of premises except persons holding such premises "for a term of years of which twenty-one years do not remain unexpired." It was held under that Act that a lessee holding under the residue of a long lease which expired at Michaelmas then next and then on another lease for twenty-one years commencing on the determination of the prior lease was a person holding for a term of years of which twenty-one years remained unexpired, and consequently that he was the owner within the meaning of s. 3 of the Act. The persons who are really and substantially interested in the premises are the persons on whom this charge is intended to fall. The defendants are really and substantially interested in these premises for the next twenty-five years, and it is defeating the object of the Act to

(1) (1887) 20 Q. B. D. 415.

construe the words "unexpired term" as the unexpired portion of the lease under which they happen to be holding at the present time, irrespective of any interest they may be entitled to on the expiration of that lease. The intervention of one day between the present and the future leases is a conveyancing device for preserving the rights of a reversioner at the termination of the earlier lease. For the purposes of the present statute its existence may be ignored.

Acland, K.C. (*J. Bruce Williamson* with him), for the defendants. There is no sufficient reason for reading the words of this enactment in any but their ordinary sense. The unexpired term must mean the term on which the person holds and on which he pays his rent. Term and rent are to be read in close collocation: the person is enabled to make the deductions from his rent, which can only mean the rent stipulated in the lease or tenancy on which he holds—that is the term on which he holds—and the amount he may deduct varies with the length of the unexpired portion of that term. He does not pay rent on the reversionary term. The defendants might assign the reversionary term. In truth the reversionary term is no term at all, but a mere interesse termini, which does not enlarge the term of the original lease: *Lewis* v. *Baker*. (1)

Macmorran, K.C., in reply.

July 12. A. T. LAWRENCE J. read the following judgment:—This is a special case stated by consent of the parties to determine a question which has arisen between them as to the true construction of a provision of the Licensing Act, 1904.

The plaintiff is the owner and the defendants are the lessees, with sub-tenants in actual possession, of two licensed houses known as the Queen and the Roebuck. The lease of the Queen expires on December 25, 1909; the lease of the Roebuck expires on December 25, 1917. On August 2, 1895, reversionary leases of both houses were, in consideration of certain premiums, granted by the plaintiff to the defendants, commencing in each case on the day next but one after the expiration of the existing lease. Under the Licensing Act, 1904, a compensation charge

(1) [1905] 1 Ch. 46.

1909

LLANGATTOCK (LORD) v. WATNEY, COMBE, REID & CO., LIMITED.

A. T. Lawrence J.

has been imposed by the Court of quarter sessions of 30*l.* in respect of the licence of the Queen and of 40*l.* in respect of the licence of the Roebuck. A quarter's rent of each house is now due from the defendants to the plaintiff.

The defendants seek to make deductions from the rents in respect of these compensation charges. It is not disputed that they are entitled to do so by virtue of s. 3, sub-s. 3. The question in dispute is as to the amount so to be deducted. The defendants contend that for this purpose their interests under the reversionary leases should be ignored and regard be had to their interest under the original leases only. The difference in the amount to be deducted if the defendants' view prevails is very considerable, as according to the plaintiff's contention it is limited to 7 per cent. of the charge, whereas the defendants make it 88 per cent. of the one charge and 45 per cent. of the other.

The question is one of some difficulty. The Act provides that the person from whose rent a deduction is made may make such deductions from rent as are set out in the Second Schedule, and the schedule provides that a person whose "unexpired term" does not exceed two years may deduct a sum equal to 88 per cent. of the charge. The defendants contend that the word "term" should receive a technical interpretation, meaning an estate in the premises known to the law as a lease or term of years, and that the reversionary leases which they hold in the premises are not "terms" in this sense. The defendants' interest under each of the reversionary leases is no doubt an interesse termini and not a term of years. If this were a real property statute or one dealing with the incidents of real estate, I think that this contention of the defendants would be correct; but it is not; it is a statute dealing entirely with licences.

The scheme of the statute is to provide a fund out of which to compensate persons interested in licences the renewal of which is refused for the supposed good of the community. Inasmuch as the custom of the house so closed is supposed to become distributed amongst those houses which remain licensed, the persons interested in the latter are called upon to provide the compensation fund in certain proportions. Occupation of the house is

necessary in order to enjoy the benefits of the licence, so the schedule makes those whose occupation is the more remote contribute the less towards the fund. Those who have the right to occupy in a year or less time pay the whole of the charge. This schedule seems to me to have no concern with rights of distress or other incidents of real property; when it says "unexpired term" it merely means the period of time during which the person has the power to occupy the premises by himself or his tenants and so to enjoy the benefits of the licence. In the body of the Act the phrase used is "persons interested in the licensed premises." I think the defendants are persons interested in the licensed premises for the period of the present and the reversionary leases. The day intervening between the existing and the reversionary leases is inserted to preserve the power of distress, &c. It is not intended to be acted upon by the lessor's entering and occupying or, as would be necessary if he did, obtaining a transfer and making a retransfer of the licences. To give the word "term" the meaning the defendants contend for would defeat the intention of the statute by imposing the burden upon the person who could not reap the benefit. The word "term" standing by itself is not a technical expression. The word has many meanings. In this schedule I think it refers to the period of time during which the interest in the premises of the person making the deduction remains unexpired. I think, therefore, that the plaintiff's contention is correct, and give judgment for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Johnson, Long & Co.*
Solicitor for defendants: *A. Holte Macpherson.*

W. H. G.

1909
July 24.

DENDY *v.* EVANS AND ANOTHER.

Landlord and Tenant—Forfeiture—Relief—Writ claiming Possession—Election to determine Tenancy—Underlease—Relief granted to Assignee of Lessee—Effect on Underlease—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

A lease of premises contained a covenant by the lessee to keep the premises in repair, and there was a proviso for re-entry upon breach of any covenant in the lease. The lessee sub-let the premises to the defendant, the underlease containing a covenant to repair similar to that in the head lease and a similar proviso for re-entry. The premises having become out of repair, the lessor issued a writ against the lessee to recover possession thereof. The lessee thereupon assigned to the plaintiff the term granted by the lease and the benefit of the arrears of rent, and the plaintiff applied for and obtained an order under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, that all further proceedings in the action should be stayed, and that the plaintiff should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The plaintiff then brought an action against the defendant to recover rent due upon the underlease subsequent to the issue and service of the writ by the lessor to recover possession of the premises:—

Held that, though the issue and service of the writ by the lessor to recover possession operated as a final election by him to determine the lease, the effect of the subsequent order for relief was to restore the lease as if it had never become forfeited, and therefore the underlease also remained in existence, and the plaintiff was entitled to recover the amount claimed.

TRIAL of action before Darling J. without a jury.

The action was brought to recover 60*l.*, being three quarters' rent of certain premises. By an indenture of lease dated April 24, 1891, Daniel Dendy demised the premises in question, namely, a yard with buildings thereon, to one Walter Wallis for the term of twenty-one years from March 25, 1891, at a yearly rent, and Wallis covenanted to repair and keep in repair the buildings upon the demised premises, and there was a proviso for re-entry upon breach of any covenant in the lease. By an indenture of underlease dated February 11, 1907, Wallis demised the premises to one Alfred Evans for the term of $5\frac{1}{4}$ years (being the remainder of the above-mentioned term of twenty-one years) less three days from December 25, 1906, at the yearly rent of 80*l.*, payable quarterly on the usual quarter days. The underlease contained a covenant,

in similar terms to the covenant in the lease of April 24, 1891, by the underlessee to repair and keep in repair the demised premises, and also a covenant by him to observe and perform all the covenants under and subject to which the premises were held by the underlessor and on the underlessor's part to be observed and performed (save only the payment of rent), and to indemnify the underlessor against all losses, damages, and costs by reason of the non-observance or non-performance of the said covenants; and there was a proviso for re-entry upon breach of any of the covenants in the underlease. Alfred Evans died on November 29, 1907, having by his will appointed the defendants the trustees and executors thereof, and the above-mentioned premises became vested in them subject to the trusts of the will.

On October 27, 1908, Daniel Dendy, after having served the requisite notice under s. 14 of the Conveyancing and Law of Property Act, 1881, issued a writ in the King's Bench Division against Wallis to recover possession of the premises upon a forfeiture of the term by reason of a breach of the covenant to repair. Wallis gave notice of this action to the defendants, and also served a notice upon them requiring them to execute certain repairs to the premises as specified in the schedule annexed to the notice.

By an indenture dated February 16, 1909, Wallis as beneficial owner assigned to the plaintiff, Kate Dendy, the premises comprised in the lease of April 24, 1891, for the residue of the unexpired term granted by the lease, subject to the indenture of underlease of February 11, 1907, and with the benefit of the arrears of rent thereunder due from Alfred Evans or his executors from June 24, 1908. The plaintiff thereupon applied in the action of *Dendy* v. *Wallis* for relief from the forfeiture under s. 14 of the Conveyancing and Law of Property Act, 1881, and on May 28, 1909, an order was made by the Master by consent that "all further proceedings in this action be stayed, and that the applicant be relieved from any forfeiture of the lease dated the 24th day of April, 1891, referred to in the indorsement of the writ in this action, and that she do hold the demised premises according to the said lease without any new lease."

1909

DENDY v. EVANS.

The plaintiff thereupon brought this action against the defendants, as the executors of Alfred Evans, to recover 60*l*., being three quarters' rent of the premises to March 25, 1909, due under the underlease of February 11, 1907. Upon an application under Order XIV. for leave to sign final judgment for the amount claimed, the defendants contended that Daniel Dendy by the issue and service of the writ against Wallis to recover possession of the premises irrevocably determined the lease to Wallis as from the date of the service, and that the underlease was also thereby similarly determined. An order was made giving the defendants leave to defend, and that the action should be entered in the list for hearing under Order XIV., r. 8.

Schiller, for the plaintiff. The relief from forfeiture granted to the plaintiff on May 28, 1909, kept alive the original lease of April 24, 1891, and, if so, the underlease to Evans was also kept alive. Formerly a Court of Equity would have granted relief from forfeiture for non-payment of rent, and as the lease was gone at law by the re-entry, the only way the Court could give relief was by creating a new lease. The Landlord and Tenant Act, 1730 (4 Geo. 2, c. 28), s. 4, gave the Court power to grant relief in such a case upon the terms of the lessee continuing to hold the demised lands according to the old lease without any new lease made. That provision is now embodied in s. 212 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which statute now, together with s. 1 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), regulates the power to grant relief from forfeiture for non-payment of rent, s. 14, sub-s. 8, of the Conveyancing and Law of Property Act, 1881, expressly providing that that section is not to affect the law relating to relief in case of non-payment of rent. Therefore the effect of giving relief in the case of non-payment of rent is to keep the old lease alive. In the present case the forfeiture was for breach of a covenant to repair, and the plaintiff obtained relief under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881. No doubt the issue and service of the writ of summons to recover possession of the premises operated

as a conclusive election by the lessor to determine the lease: *Serjeant* v. *Nash, Field & Co.* (1); but that must be subject to relief from the forfeiture being subsequently given, which when given relates back and resuscitates the lease as a valid lease which has never become forfeited. In *Serjeant* v. *Nash, Field & Co.* (1) the forfeiture was for breach of a covenant not to assign or underlet without leave, and no relief could have been granted to the lessee under s. 14 of the Act of 1881, as, by sub-s. 6, that section does not extend to a covenant against assigning or underletting the premises. Sect. 14, sub-s. 2, of the Act of 1881 merely extends the power to grant relief, which was given by the Common Law Procedure Acts, to other cases, and inasmuch as under those Acts the old lease was kept alive upon relief being granted, so when relief is granted under s. 14, sub-s. 2, of the Act of 1881, the true construction of that section is that the old lease is kept alive as if it had never become forfeited. The word "relief" implies that the forfeiture must be deemed never to have existed, and the old lease remains. It is somewhat analogous to the annulment of an adjudication in bankruptcy. The original lease, therefore, being still in existence, the underlease also is in existence, and the defendants are liable not only for the quarter's rent which accrued due on September 29, 1908, before the action to recover possession of the premises was brought, but also for the two quarters' rent up to March 25, 1909.

J. A. Foote, K.C., and *Ward Coldridge*, for the defendants. It is admitted that the rent for the quarter ending on September 29, 1908, is due, because the writ in the action to recover possession of the premises was issued and served after that date. But the defendants are not liable to pay the other two quarters' rent claimed. It has always been the law that the bringing of an action to recover possession of premises for a forfeiture operates as a final election by the lessor to determine the term: *Jones* v. *Carter* (2); and the Common Law Procedure Act, 1852, has made no alteration in that respect. Therefore the service of the writ by the original lessor to recover possession of the premises on the ground of forfeiture determined the lease,

(1) [1903] 2 K. B. 304. (2) (1846) 15 M. & W. 718.

1909

DENDY v. EVANS.

and the necessary effect of that was to determine the underlease, which could not exist apart from the lease. The only question is as to the effect of the order for relief, which for the purposes of this part of the argument must be assumed to have been properly made. Before the Act of 4 Geo. 2, c. 28, s. 4, when a Court of Equity gave relief from forfeiture for non-payment of rent, it was done by granting a new lease. That Act provided that in such a case the lessee should hold the demised lands according to the lease made without any new lease. That was re-enacted in s. 212 of the Common Law Procedure Act, 1852. Those enactments were confined to relief from forfeiture for non-payment of rent. Sect. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, which enables a lessee to apply for relief from forfeiture in all other cases except (inter alia) in the case of the breach of a covenant against assigning, underletting, parting with the possession, or disposing of the land leased, does not contain the words that the lessee after relief shall hold the demised lands according to the lease thereof made without any new lease. It is not necessary to contend that those words in the earlier Acts only mean that the lessee is to hold under a new tenancy according to the terms of the old lease, though that lease is not revived. It may be assumed for the purposes of this case that in such a case the old lease is revived with all its incidents by the grant of relief. There are, however, no such words in s. 14, sub-s. 2, of the Act of 1881. The omission of those words shews that the intention of the Legislature was to revert to the law under which a Court of Equity used to give relief before 4 Geo. 2, c. 28, s. 4, namely, by creating a new lease. The original lease therefore ceased to exist when the lessor brought the action to recover possession of the premises, and the Master had no jurisdiction to insert words in the order for relief that the applicant should hold the demised premises "without any new lease." There is no authority for the insertion of those words. In *Serjeant* v. *Nash, Field & Co.* (1) Stirling L.J., in discussing s. 4 of the Conveyancing and Law of Property Act, 1892, which enables an underlessee to apply for relief where the original lessor is proceeding to enforce a right of re-entry or

(1) [1093] 2 K. B. 304, at p. 313.

forfeiture under a covenant or proviso in the lease, said that an order under that section vesting the property in him created a new estate or interest in the underlessee, and was not an affirmance of his former estate or interest. That section is in pari materia with s. 14, sub-s. 2, of the Act of 1881, and the reasoning of Stirling L.J. ought to be applied to a case where relief is granted to a lessee under this latter section. The lease therefore ceased to exist, and the underlease fell with it.

Next, the relief was not granted to the defendant in the action, but by a consent order to a person who, though an assignee of the lease at the time, was not a party to the action. The relief was therefore improperly granted and has no effect.

Schiller, in reply. Sect. 14, sub-s. 2, of the Act of 1881 enables a lessee to apply for relief, and by sub-s. 3 "lessee" includes the assignee of a lessee. The plaintiff, being the assignee of the original lessee, was entitled to apply for relief: *Howard* v. *Fanshawe*. (1) Then with regard to s. 4 of the Conveyancing and Law Property Act, 1892, that section necessarily goes much further than s. 14, sub-s. 2, of the Act of 1881. It contemplates that when an underlessee applies for relief in an action by the original lessor to recover possession a new lease will be granted to him direct from the lessor, and the Court may impose such conditions as it pleases. In *Serjeant* v. *Nash, Field & Co.* (2) Stirling L.J. was dealing with a case where the lessee was not entitled to claim relief under s. 14, sub-s. 2, of the Act of 1881, and he did not deal with that section; and indeed there was no claim for relief by the underlessee under s. 4 of the Act of 1892. Incidentally he made some observations as to the effect of giving an underlessee relief under this latter Act, as to which no question arises in this case. [He also referred to *West* v. *Rogers* (3), and Foa on Landlord and Tenant, 4th ed., p. 663.]

DARLING J. This is an action to recover a sum of 60*l*., alleged to be due on March 25, 1909, in respect of three quarters' rent of certain premises. With reference to the first quarter ending on September 29, 1908, there is no doubt that

(1) [1895] 2 Ch. 581. (2) [1903] 2 K. B. 304, at p. 313.
(3) (1888) 4 Times L. R. 229.

1909

DENDY v. EVANS.

Darling J.

the rent for that quarter is due, and admittedly so, because the writ in the action by the lessor to recover possession of the premises was not issued and served until after that date. The question I have to decide arises in connection with the last two quarters' rent.

The plaintiff had acquired by assignment a term which was vested in the original lessee, Wallis. Wallis had taken a lease of the premises from his lessor, Daniel Dendy, and there had been a failure to perform the covenant to repair contained in the lease. The lease thereupon became liable to be forfeited at the election of the lessor, and the latter issued and served a writ to recover possession of the premises, which was equivalent to the ancient entry, and thus he elected to forfeit the term and to treat the lease as at an end. The plaintiff thereupon, having acquired by assignment whatever rights Wallis had under the lease, applied to the Court for relief against the forfeiture, and an order was made that "all further proceedings in this action"—*Dendy* v. *Wallis*—"be stayed, and that the applicant be relieved from any forfeiture of the lease dated the 24th day of April, 1891, ... and that she do hold the demised premises according to the said lease without any new lease."

Now I think that the plaintiff, as the assignee of the original lessee, Wallis, was entitled to apply for relief under s. 14, sub-s. 2, of the Conveyancing Act, 1881, though she was not a party to the action, and that the order for relief was as good in her hands as if it had been granted to the defendant in the action. The real question is, what is the effect of the order for relief?

If the lease to Wallis had become forfeited owing to non-payment of rent, relief could have been granted under ss. 211 and 212 of the Common Law Procedure Act, 1852 (the latter section being merely a re-enactment of s. 4 of 4 Geo. 2, c. 28), and s. 1 of the Common Law Procedure Act, 1860, and the consequence would have been that the lessee or his assignees would have held the demised lands "according to the lease thereof made without any new lease," that is to say, the result would have been the same as if the lease had never become forfeited. To my mind the word "relief" prima facie implies that the forfeiture has been

done away with, and that the lease must stand as if it had never been forfeited. That statute, however, does not apply to this case, because the forfeiture here was for breach of covenant to repair, and not for non-payment of rent, and therefore relief could not have been granted under the Common Law Procedure Acts. Relief was granted under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881. Sub-s. 1 of that section provides that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable unless and until the lessor serves the required notice on the lessee. By sub-s. 2, "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit." By sub-ss. 6 and 8 a forfeiture for assigning, underletting, parting with the possession or disposing of the land, and a forfeiture for non-payment of rent are excluded from the operation of the section. It is argued on behalf of the defendants that there is a distinction between the effect of granting relief from forfeiture for non-payment of rent and granting relief from forfeiture for breach of covenant to repair; that in the former case the grant of relief by the express provisions of the statute has the effect of reviving the lease with all its incidents, as if the lease had never become forfeited, but that in the latter case there is no such provision in the statute, and that, as the term has come to an end by the lessor bringing the action to recover possession, the effect of granting relief is not to revive the term, but to create a new term; and therefore, that being so, the original lease here is gone and the underlease with it, and so the plaintiff cannot sue the defendants, the underlessees, for the two quarters' rent

1909

DENDY v. EVANS.

Darling J.

due after the election by the lessor to treat the lease as at an end. I do not think that is so. If that contention be correct, the person obtaining relief under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, is placed in a worse position than if he obtained relief under s. 212 of the Common Law Procedure Act, 1852. I cannot adopt that construction of the section. As I have said, I think that the word "relief" carries with it the meaning that the forfeiture is deemed not to have taken place at all. Sect. 4 of the Conveyancing and Law of Property Act, 1892, has been referred to, but it is unnecessary to express any opinion upon that section. The relief here was granted to the assignee of the lessee under s. 14, sub-s. 2, of the Act of 1881, and it is sufficient to say that, in my opinion, where relief is granted to a lessee or his assigns under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, the applicant is in the same position as if he were granted relief from forfeiture for non-payment of rent; and if that is so, as soon as the relief is granted the forfeiture disappears just as if there never had been any forfeiture at all. The underlease therefore stands, and the plaintiff is entitled to recover the two quarters' rent. There must be judgment for the plaintiff for the amount claimed.

Judgment for the plaintiff.

Solicitors for plaintiff: *Hare & Co., for Cooper & Norgate, East Dereham.*

Solicitors for defendants: *Upton, Britton & Lumb.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1909
July 23, 30.

EDWARDS & CO. *v.* PICARD.

Practice—Execution—Receiver—Patent—Equitable Execution—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The defendant, against whom the plaintiffs had recovered judgment in an action, which remained unsatisfied, was resident abroad, and had no property within the jurisdiction available for the purposes of a fieri facias, or other ordinary process of execution. He was the registered owner of three English patents, but it was not shewn that he was in receipt of any profits therefrom by way of royalties or otherwise. On an application for the appointment of a receiver, by way of execution, of all rents, profits, and moneys receivable in respect of the defendant's interest in the patents:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that an order for appointment of a receiver could not in such a case be made.

Holmes v. *Millage*, [1893] 1 Q. B. 551, followed.

Appeal from an order made by Sutton J. at chambers refusing to appoint a receiver as after mentioned.

In an action brought by solicitors for work done and disbursements made for the defendant, the plaintiffs recovered judgment against the defendant for 221*l.* 8*s.* 11*d.* and costs in default of appearance, which judgment remained unsatisfied. The defendant resided in Paris, and appeared to have no property within the jurisdiction available for the purposes of a fieri facias or other ordinary process of execution. He was the registered owner of three English patents relative to taximeters. It was not shewn that he was in receipt of any profits therefrom, either by way of royalties or otherwise.

An application having been made at chambers by the plaintiffs for an order for appointment of a receiver of all rents, profits, and moneys receivable in respect of the defendant's interest in the before-mentioned patents, in or towards satisfaction of the above-mentioned judgment, Sutton J. refused the application.

J. D. Crawford, for the plaintiffs. A patent is in the nature of a chose in action: *British Mutoscope and Biograph Co.* v.

C. A. 1909

EDWARDS & CO. v. PICARD.

Homer. (1) It cannot be taken in execution under a fi. fa. or other ordinary process of execution at common law. These patents are, however, assets of the defendant, and the remedy by equitable execution extends to whatever is considered in equity to be an asset of the judgment debtor: *Blanchard* v. *Cawthorne* (2); *Gore* v. *Bowser* (3); Kerr on Receivers, 5th ed. p. 110. The decision in *Holmes* v. *Millage* (4), on the authority of which this application was refused at chambers, has really no application to the present case. There the appointment of a receiver was made in respect of the future earnings of a judgment debtor in his employment, and it was held that, inasmuch as no Court could before the Judicature Acts have made such an order by way of execution, there was no jurisdiction to make such an order since those Acts. There is no analogy between such an order and that which is asked for in the present case. It could not be said that the future earnings of a judgment debtor were existing assets like these patents. It is contended that a Court of Equity could before the Judicature Acts, where there was no property available for the purpose of legal execution, have made an order for the appointment of a receiver by way of equitable execution in respect of property of a judgment debtor like these patents which could not be reached by legal process of execution. [He also cited *In re Shephard*. (5)]

The defendant, not having appeared in the action, was not represented by counsel.

Cur. adv. vult.

July 30. The following written judgments were read:—

VAUGHAN WILLIAMS L.J. This is an appeal against an order of Sutton J. refusing to make an order on plaintiffs' summons for the appointment of a receiver of the defendant's interest in certain patents.

I am of opinion that this appeal should be dismissed.

The affidavit filed on behalf of the plaintiffs, after stating that the defendant has no property within the jurisdiction of the

(1) (1901) 18 Rep. Pat. Cas. 177, at p. 179.
(2) (1831) 4 Sim. 566.
(3) (1855) 3 Sm. & G. 1, at p. 8.
(4) [1893] 1 Q. B. 551.
(5) (1889) 43 Ch. D. 131.

C. A.
1909
EDWARDS & Co. v. PICARD.
Vaughan Williams L.J.

Court which can be taken by way of fi. fa., elegit, or other ordinary process of execution, and that the only property which the defendant possesses in this country is three patents relating to taximeters, sets forth that the plaintiffs desire the appointment of a receiver of the defendant's said property.

I think that the judgment of Lindley L.J. in *Holmes* v. *Millage* (1) is really conclusive of this case.

This is not a case in which the plaintiffs rely upon any charge or assignment of the defendant's interest in these patents in their favour, directly or indirectly. Now, as pointed out by Lindley L.J., the only section of the Judicature Acts expressly applying to receivers is s. 25, sub-s. 8, of the Judicature Act, 1873, which provides that a receiver may be appointed in all cases in which it shall appear to the Court just or convenient that such order should be made. *Holmes* v. *Millage* (1) decides that the Court cannot grant equitable execution by the appointment of a receiver in a case where prior to the Judicature Acts no Court could grant such relief.

Now, what is the right of the patentee? It is a chose in action, created by the exercise of the Royal prerogative, and entirely distinct from the right of property in a chattel created under it; and the patentee's right under the patent, being a chose in action, cannot be taken under a fi. fa., or levari facias, since it has no locality, and therefore cannot be found upon the premises. Lord Herschell in *Steers* v. *Rogers* (2) says: "What is the right which a patentee has, or patentees have? It has been spoken of as though a patent right were a chattel, or analogous to a chattel. The truth is that letters patent do not give the patentee any right to use the invention—they do not confer upon him a right to manufacture according to his invention. That is a right which he would have equally effectually if there were no letters patent at all—only in that case all the world would equally have the right. What the letters patent confer is the right to exclude others from manufacturing in a particular way and using a particular invention. When that is borne in mind, it appears to me, I confess, very clear that it would be impossible to hold, under these circumstances, that, where there are several

(1) [1893] 1 Q. B. 551. (2) (1893) 10 Rep. Pat. Cas. 245, at p. 251.

C. A. 1909

EDWARDS & Co. v. PICARD.

Vaughan Williams L.J.

patentees, either of them, if he uses the patent, can be called upon by the others to pay to them a portion of the profits which he makes by that manufacture, because they are all of them entitled, or perhaps any of them entitled, to prevent the rest of the world from using it." I do not think that there is any property of the patentee for the receiver to receive, and I do not know to whom he could give notice.

FLETCHER MOULTON L.J. In this case Messrs. J. J. Edwards & Co., the plaintiffs, have obtained judgment against the defendant, Réné Picard, for the sum of 221*l.* 8*s.* 11*d.* and 9*l.* 1*s.* 8*d.* costs, making a total of 230*l.* 10*s.* 7*d.* This judgment still remains unsatisfied. The defendant resides in Paris, and, so far as is known, possesses no property in this country capable of being seized under fi. fa. or any of the other writs by which execution for a judgment debt is ordinarily obtained. He is, however, the registered owner of three patents relative to taximeters, which appear to be of value. The plaintiffs now apply to the Court to appoint a receiver of all rents, profits, and moneys receivable in respect of the defendant's interest in those patents in or towards satisfaction of this unpaid judgment debt. The judge in chambers has refused the application, and from that refusal an appeal has by leave been brought to this Court.

The main question is one of jurisdiction, i.e., whether the Supreme Court can grant a receiver under such circumstances, in order to enforce effectually its own judgments. If there be such jurisdiction, it is clearly a case where the Court should avail itself of all its powers, in order to compel payment of the judgment debt. The defendant, being domiciled and resident abroad, cannot be reached by process of bankruptcy. The property of which he is possessed, and out of which the judgment creditors ought to be able to obtain satisfaction of the judgment, is property created by English law. The privileges given by the grant are confined to this realm, and enforceable by our Courts, and by those only. The title to these grants depends on a register kept in England under a British statute. So far as rights or choses in action can have any locality, the property is therefore

situated entirely within the realm, and it will be a reproach to our judicial system if, while in the enjoyment of property of this kind, a judgment debtor can defy our Courts and refuse to satisfy a judgment obtained against him. I should not be a party to permitting this, unless I was clearly convinced that the Court is powerless to give relief in the matter, and I should deem it to be the duty of the Court to use all powers vested in it for the purpose of preventing such an attempt being successful.

By s. 25, sub-s. 8, of the Judicature Act, 1873, it is provided as follows: "A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just." Two remarks must be made on the above provision before we proceed to apply it. In the first place, "interlocutory" does not limit the power to the period between the writ and final judgment. It is clear on authority, as well as on the words of the statute, that it applies after judgment as well as before, and a receiver, if appointed on this application, would be appointed under an interlocutory order. In the next place, this does not purport merely to continue old powers, or old practice of the Courts, or any of them, but to confer new statutory powers. All the powers which the Courts of common law or equity previously possessed were preserved and bestowed on all branches of the Supreme Court alike by other portions of the Act, and therefore these provisions would have been unnecessary if they did not enlarge the powers of the Courts.

This being so, it appears to me that this is eminently a case where it is both just and convenient to appoint a receiver as prayed. The effect of the words "just or convenient" is to my mind much the same as "where it is practicable and the interests of justice require it." Both these conditions are satisfied in the present case. That the interests of justice demand that the property of a judgment debtor should not escape the payment of his judgment debts is evident, and the appointment of a receiver, especially if followed up by an injunction such as was granted in

C. A. 1909

EDWARDS & Co. v. PICARD.

Fletcher Moulton L.J.

Willcock v. *Terrell* (1), would in practice be very effective to this end.

The main argument against granting the application was based on the practice of the old Court of Chancery in granting a receiver by way of what was known as equitable execution. The dictum of Lindley L.J. in *Holmes* v. *Millage* (2) was relied on. But these words must be taken in connection with the subject-matter to which they were applied. As a general statement applicable to all cases they are clearly too narrow, for they would exclude such cases as *Blanchard* v. *Cawthorne*. (3) But, even if the dictum were a correct and complete statement of the practice of the old Court of Chancery, it would to my mind afford no sufficient answer to this application. We have no right to refuse to use the new powers given to us for the advancement of justice by s. 25, sub-s. 8, of the Judicature Act, 1873. Whether these patents are properly termed "choses in action," as Farwell L.J. has held in *British Mutoscope and Biograph Co.* v. *Homer* (4), or "incorporeal chattels," as Stephen terms them (5), they are clearly assets which ought to be reached by some process of execution, and can be effectively reached if we use the powers so given to us; and we are not, in my opinion, justified in letting them escape because the old Court of Chancery, with its lesser powers, would have failed to assist the judgment creditor.

The other argument is that it is not shewn that there are any "rents, profits, and moneys" coming from these patents, or, in other words, that there is anything to receive. This may be put more clearly thus: "If licences had been granted, it would have been proper to grant a receiver of the royalties payable thereunder; but it is not shewn that there are any." The answer, to my mind, is that this does not go to jurisdiction. If there may be such moneys at any time, it is clear that the Court is not obliged to wait till they are actually being paid before appointing a receiver, if it has power to appoint one. It is true that in general it would not appoint a receiver without a probability that the appointment would be effectual and useful.

(1) (1878) 3 Ex. D. 323.
(2) [1893] 1 Q. B. 551, at p. 555.
(3) 4 Sim. 566.
(4) 18 Rep. Pat. Cas. 177, at p. 179.
(5) See Stephen's Commentaries, 15th ed., vol. 2, p. 8.

But in the present case it is clearly desirable that the receiver should be appointed as soon as possible in order that nothing may escape him; and, as I have said, the justice of the case is so strongly on the side of helping the judgment creditors that we ought not to allow such a matter of discretion to interfere with our giving them all the assistance we can.

For these reasons I am of opinion that we can and ought to grant the application.

BUCKLEY L.J. The plaintiffs have recovered against the defendant judgment for 221*l.* and costs. He is a foreigner resident abroad. The summons before us is one asking for the appointment of a receiver of the rents, profits, and moneys receivable in respect of the defendant's interest in certain patents. The only evidence is an affidavit that the defendant has no property within the jurisdiction which can be taken by fi. fa. or other ordinary process of execution, and that the only property which the defendant possesses in this country is three patents relating to taximeters. There is therefore no evidence that any licences have been granted in respect of which royalties are receivable, or that any business is being carried on by the use of the patents, or that there is anything receivable in respect of them. There is nothing more than the bare fact that the defendant is the owner of three British letters patent.

We have in this case nothing to do with such questions as would arise where contractual relations in respect of the patents had been created between the plaintiffs and the defendant. If such relations existed, say relations of mortgagor and mortgagee, or of vendor and purchaser, considerations would arise with which we have here nothing to do. Neither are we concerned with a case in which it was shewn that some licensee in this country was paying royalties, or that some business in this country was producing profits. In so saying, it must not be supposed that I am implying that in such a case a receiver could be obtained. I only say that it is not this case.

A patent has been described as an incorporeal chattel. I am not sure what legal qualities are involved in that description. The legal qualities of a patent are, not that it confers upon the

C. A. 1909

EDWARDS & Co. v. PICARD.

Buckley L.J.

patentee a right to manufacture, for that he could do without a patent, but that it gives him a monopoly in the manufacture. It creates in him a right of action to prevent any one else manufacturing. It creates in him a right to bring an action for infringement with resultant remedy by way of injunction, or damages, or both. This right is a legal right. There is no question of equity in the matter. This right must either be amenable to execution at law, or not at all. Equitable execution is relief given on the ground that there is no remedy by execution at law: it operates by removing a hindrance which prevents execution at law. There is here no hindrance for equity to remove. It is not a case in which the debtor has an equitable interest only in property which could have been reached at law if he had had the legal interest in it. The property is property in which he has the legal interest.

No reasoning is required to shew that this property is not such as could be reached by execution at law. Neither, in my opinion, can it be reached by any appeal to the jurisdiction to appoint a receiver when just and convenient under s. 25, sub-s. 8, of the Judicature Act, 1873. The whole subject is discussed, and the reasoning upon which I am proceeding is to be found, in the judgment of this Court as delivered by Lindley L.J. in *Holmes* v. *Millage*. (1) It was argued before us that, although the patent is producing no profits now, it may produce by way of royalty, or by way of business carried on, some profits in the future. *Holmes* v. *Millage* (1) is, I think, an answer to this. If the patentee should in the future think proper to employ his patent, which he is not bound to do, the proceeds will be future earnings of which the judgment creditors cannot have a receiver. I fail to grasp what is meant by a receiver of a patent or of the profits of a patent which is not being worked. There is nothing receivable. A receiver could not sue for infringement, nor could he, I think, bring an action to enforce any right to use the patentee's name to sue for infringement, nor could he work the patent and thus produce profits. Even if the patent were being used in a business, there could be no receiver unless an order could be obtained for a receiver and manager of

(1) [1893] 1 Q. B. 551.

the business, and I can see no right to a manager. For all these reasons I think that the appointment of a receiver is impossible.

It was suggested that orders at the instance of judgment creditors had been previously made in the King's Bench Division under circumstances such as those in the present case. I have made inquiry from the officers of the Court, and they have been so kind as to look into the matter for me. The result is that I have been referred to one case—*Rainer & Co.* v. *Holmes* (1)—in which Walton J. refused the order, giving reasons, and to another — *Wool Exchange* v. *Youla Wools* (2) — in which a learned judge made an order, but without giving any reasons, and it is the same learned judge who had, on June 21, refused the order in the case now under appeal. Those two cases and the present are the only three which, so far as is known, have occurred during the last three years, and I am informed that until about three years ago the officer giving me the information never saw one.

In my opinion the order for a receiver was rightly refused and this appeal must be dismissed.

Appeal dismissed.

Solicitors : *J. J. Edwards & Co.*

(1) March 25, 1909. (2) July 2, 1909.

E. L.

C. A.

1909

June 22, 23; *July* 17.

[IN THE COURT OF APPEAL.]

SMITH (Surveyor of Taxes) *v.* THE LION BREWERY COMPANY, LIMITED.

Revenue—Income Tax—Deductions—Profits of Brewery—Tied Licensed Houses—Compensation Charge—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1; *Sched. D.*

A company which carried on the trade of brewers were, solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof, the owners of licensed houses which they let to tenants who covenanted to buy all their beers from the company. By means of these houses, which were substantially part of the plant or outfit necessary to carry on the business profitably, the company were enabled to earn increased profits, upon which they paid income tax. The company were compelled under s. 3 of the Licensing Act, 1904, to allow to the tenants of the licensed houses certain deductions from rent in respect of the company's share of the annual compensation charge imposed on the licensed houses, and the company claimed that, in arriving at the amount of the profits of their trade as brewers assessable to income tax, a deduction ought to be allowed in respect of the sum which they were compelled to pay for the compensation charge, as being an expense incurred in carrying on that trade:—

Held by Cozens-Hardy M.R. and Farwell L.J. (Kennedy L.J. dissenting) that, on the facts as found by the Commissioners for the General Purposes of the Income Tax Acts, the sum which the company were compelled to pay for the compensation charge was a payment necessary to enable them to earn profits as a brewery company and might properly be deducted from the profits with a view to ascertaining the balance on which income tax had to be paid.

Decision of Channell J., [1909] 1 K. B. 711, reversed.

Appeal from a decision of Channell J. (reported [1909] 1 K. B. 711) on a case stated for the opinion of the Court by the Commissioners for the General Purposes of the Income Tax Acts as follows:—

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts (Second East Brixton Division) held at the Session House, Newington Causeway, in the county of Surrey, on November 13, 1906, the Lion Brewery Company, Limited, appealed against an assessment of 44,652*l.* (after deduction of the deduction allowed for diminished value by reason of wear and

tear during the year of machinery and plant, pursuant to 41 & 42 Vict. c. 15, s. 12) made upon them for the year ending April 5, 1907, under Sched. D of the Income Tax Acts in respect of the profits arising from the business of brewers and sellers of beer carried on by them.

2. The facts stated in paragraphs 3 to 8 inclusive of this case were established as such to the satisfaction of the Commissioners.

3. The Lion Brewery Company, Limited (hereinafter called the respondents), were, as part of their business and as a necessary incident of the profitable exploitation of such business, the owners of certain freehold licensed premises, and also lessees of other licensed premises, all of which premises had been acquired by the respondents, and were held by them, in the course of and solely for the purposes of their said business. The premises were let by the respondents to tenants, who covenanted to deal only with the respondents in the way of their business, and in consideration thereof and the purchase of beers from the respondents they paid a much less rent than the annual value of the premises would warrant. By these means and the possession and use of the premises, which were employed by the respondents as substantially part of their plant or outfit necessary to carry on the business profitably, the respondents were enabled to earn and did earn profits upon which they paid income tax, and which without the said premises and their use in and for carrying on their business would be much less in amount.

4. The profits of the respondents had always been greatly increased by reason of the employment and use of such premises in and for the purposes of the respondents' business, and to enable the respondents to earn the profits upon which they were assessed to the income tax the possession and employment as aforesaid of such premises were essentially necessary, and except for the purposes of and employment in their business of such premises the respondents would not possess them. They did not possess them as investments or for the purposes of investments. If any house lost its licence the respondents as soon as possible got rid of it.

5. Under and by virtue of the Licensing Act, 1904, s. 3, the respondents were compelled to allow, and allowed, to their

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

tenants such deductions from rent as were provided for by the statute.

6. The respondents in their turn, when paying rent in respect of such of the premises as were rented by them, deducted from such rent such deductions as were authorized and directed by the Act.

7. The net result produced by such deductions as are above mentioned in paragraphs 5 and 6 was that the respondents were compelled to pay, and did pay, in respect of the year ending December 31, 1905, in respect of charges imposed by the Act an amount of 3600*l.*, no part of which was returned or made up or allowed to them, and was borne and paid by the respondents out of their own moneys.

8. None of the premises in respect of which the deductions resulting in the sum of 3600*l.* were made were in the occupation of the respondents.

9. The respondents contended that, having regard to the facts, in arriving at their assessable profits of their business for the year ending December 31, 1905 (being the last of the three years in respect of which the assessment for the year ending April 5, 1907, made upon the respondents, was based), they were entitled to take into consideration and to have, pursuant to the Income Tax Acts, a deduction allowed to them in arriving at the assessable amount of their profits in respect of the sum of 3600*l.*

10. For the Crown it was contended, inter alia, that the respondents had to bear and pay the sum of 3600*l.* as landlords or owners of licensed premises, and not as brewers or traders, and that the deduction claimed was not one which could be allowed under 5 & 6 Vict. c. 35, s. 100, case 1, rr. 1 and 3, and r. 1 of the "Rules applying to both the preceding cases," namely, cases 1 and 2, or otherwise, and that the deductions were deductions in respect of capital.

11. The following cases were referred to: *Watney & Co.* v. *Musgrave* (1), *Brickwood & Co.* v. *Reynolds* (2), and *Hancock & Co.* v. *Gillard.* (3)

12. The Commissioners were of opinion, on a consideration of

(1) (1880) 5 Ex. D. 241. (2) [1898] 1 Q. B. 95.
(3) [1907] 1 K. B. 47.

the facts stated in paragraphs 3 to 8 inclusive, that the contention of the respondents was correct, and they decided that the assessment made upon them ought to be reduced, and they reduced the same by the sum of 1200*l.*, namely, one-third of the sum of 3600*l.*, accordingly.

The surveyor of taxes appealed; and Channell J. allowed the appeal, holding that the company were not entitled to deduct the 1200*l.*, which represented their share of the compensation charge payable by them as owners of the licensed houses, inasmuch as it was not an expense incurred wholly for the purposes of their trade.

The company appealed.

Sir R. Finlay, K.C., *Danckwerts, K.C.*, and *Leslie Scott, K.C.*, for the company. The brewery company acquire these public-houses for the purpose of extending the sale of their beer, and the charge imposed by the Licensing Act, 1904, which has eventually to be paid by the brewery company, is one of the expenses properly incurred for the purpose of earning profits, and therefore may be deducted as an expense necessarily incurred in carrying on the trade of brewers. The payment of this compensation levy is a disbursement within the meaning of s. 100, cases 1 and 2, r. 1, Sched. D, of the Income Tax Act, 1842.

The decision in *Watney & Co.* v. *Musgrave* (1) can no longer be supported; it was not followed in *Reid's Brewery Co.* v. *Male.* (2) The decision in *Brickwood & Co.* v. *Reynolds* (3) is distinguishable; there the proper deduction for repairs had been already allowed, and only the extra amount expended to secure good tenants was disallowed, and there was no finding that the payment was necessary for their business. This compensation payment has nothing to do with the rent of the licensed house: *Hancock & Co.* v. *Gillard.* (4)

In *Strong & Co.* v. *Woodifield* (5) Lord Collins, then Master of the Rolls, lays it down "that the root of the matter is that all expenses necessary for the purpose of earning the

(1) 5 Ex. D. 241.
(2) [1891] 2 Q. B. 1.
(3) [1898] 1 Q. B. 95.
(4) [1907] 1 K. B. 47.
(5) [1905] 2 K. B. 350, 356.

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

profits may properly be deducted," though expenses to come out of profits after they are earned cannot. On the facts as found in paragraphs 3 and 4 of the special case it is impossible to contend that this payment of the compensation levy is not an expense necessarily incurred for the purposes of the trade of a brewer. The ownership of these houses is necessary for the trade of the company; as soon as the licence is taken away the houses are given up.

The proper method of ascertaining "profits" is dealt with in *Russell* v. *Town and County Bank* (1) and *Gresham Life Assurance Society* v. *Styles*. (2)

Sir S. T. Evans, S.-G., and *W. Finlay*, for the Crown. In the first place the nature of this compensation levy must be considered; it was not imposed for the benefit of the brewers. A private owner of a public-house cannot deduct this compensation levy from his rent, and yet it is said when the owner happens to be a brewer or a brewery company that it can be deducted in ascertaining profits. This is not a case where the brewers carry on their business upon these licensed premises; the licensed house is the business place of the tenant, and the business of the brewer is finished when the beer is delivered to the tenant. The two trades are quite separate. The case is really concluded by *Brickwood & Co.* v. *Reynolds* (3) and *Watney & Co.* v. *Musgrave*. (4)

The disbursement to be allowed must be incidental to the trade itself: per Lord Loreburn L.C. in *Strong & Co.* v. *Woodifield*. (5) The compensation charge is not incidental to the trade of a brewer; it is not a tax on the brewer, it is a tax on the licensed house to be borne by the owner of the house as landlord: by s. 2 of the Licensing Act, 1904, it is to be paid by the licence-holder with and as part of the excise licence duty, but it may be deducted from the rent payable to the landlord. The fund created by this compensation levy goes to compensate those interested in the trade of a house whose licence has been withdrawn, but the trade is the tenant's trade, though the

(1) (1888) 13 App. Cas. 418, at p. 424.
(2) [1892] A. C. 309, at p. 315.
(3) [1898] 1 Q. B. 95.
(4) 5 Ex. D. 241.
(5) [1906] A. C. 448, at p. 452.

brewery company may be interested in it; therefore it cannot properly be deducted by the brewery company as an expense incidental to their trade as brewers. There is no such trade as that of owner of public-houses.

L. Mossop, for other parties.

Sir R. Finlay, K.C., in reply. The purposes for which the compensation levy is made are not material. Income tax, as pointed out per Lord Macnaghten in *London County Council* v. *Attorney-General* (1), is a tax upon income, and the brewery company does not get its income until all expenses, including this compensation levy, have been paid. It is true that the rent of these houses is not accounted for under Sched. D, but that is because it comes under Sched. A. The Government cannot have the tax paid twice: *Gilbertson* v. *Fergusson* (2); *London County Council* v. *Attorney-General.* (3) Of course a brewer can elect whether he will carry on this particular branch of his trade or not, but if he elects to carry it on the levy is a necessary expense. The argument on the other side is inconsistent with the facts stated in the case. Income tax is part of the profits, and a sum which is an expense may be deducted before arriving at profit: *Attorney-General* v. *Ashton Gas Co.* (4) This levy has to be paid whether profit is earned or not. The same principle applies to rates not payable by the tenant; if they are deducted under Sched. A they are not deducted under Sched. D: *Gresham Life Assurance Society* v. *Styles.* (5) This levy is not an insurance against the loss of the tenant's trade, but a necessary burden imposed on the company by statute. If the owner of a public-house is not a brewer he does not make profits and this reasoning does not apply.

Sir S. T. Evans, S.-G., in reply.

Cur. adv. vult.

July 17. The following written judgments were delivered:—

COZENS-HARDY M.R. The question on this appeal is whether the owners of certain tied houses can, in ascertaining their profits

(1) [1901] A. C. 26, at p. 35.
(2) (1881) 7 Q. B. D. 562, 570.
(3) [1901] A. C. 26.
(4) [1904] 2 Ch. 621, 624, 628; affirmed [1906] A. C. 10.
(5) [1892] A. C. 309, 322.

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Cozens-Hardy M.R.

under Sched. D, deduct the amount of the charge payable by them in respect of what is called the compensation levy imposed by the Licensing Act, 1904. Now the levy is imposed on the tenant and is made payable by the tenant with and as part of the excise licence, but the tenant is authorized to deduct from his rent a proportion of the sum paid varying according to the length of the tenant's interest in the house. The landlord must pay income tax under Sched. A on the full rent, the proportionate charge being not a reduction of the rent, but a deduction from the rent. It is necessary to consider the position first of the occupying tenant, and secondly of the landlord with reference to the compensation levy.

First, as to the tenant. It seems to me not to admit of serious doubt that the actual occupier of the licensed house is entitled under Sched. D to deduct from his gross profits not only the ordinary excise licence, but also such part of the compensation levy as he is not able to throw upon his landlord. Both these payments are alike necessary to enable him to carry on the business of a retailer of beer. His position is identical with that of an auctioneer or a pawnbroker or a solicitor, each of whom has to make an annual payment to Government before he can earn, and as a condition of earning, the profits in respect of which he is chargeable under Sched. D. It is a matter of no importance to consider how the amount thus paid is applied. It may go in aid of the local rates. It may go towards the cost of the Army and Navy. It may go to provide compensation for licences withdrawn. It is sufficient to say that it is a payment which must be made if the profits of a retailer of beer are to be earned.

The position of the landlord is by no means so clear. It must vary according to the circumstances. If he is an ordinary non-trading landowner he must bear his proportion of the compensation levy, and he cannot in any way bring it into account against the Crown. He must pay income tax under Sched. A, and for the reasons above stated he cannot treat it as a reduction of the rent payable by the tenant. He does not account under Sched. D at all, and the question which has now to be decided in this case does not and cannot arise. If, however, he is a trading landlord, a wholesale dealer in beer, it is necessary to

ascertain precisely what are the facts. Now in the present case it is stated by the Commissioners that the Lion Brewery Company are "as part of their business and as a necessary incident of the profitable exploitation of such business" the owners of the tied houses which have been acquired by them and are held by them "in the course of and solely for the purposes of their said business." These tied houses are employed by them as "substantially part of their plant or outfit necessary to carry on the business profitably," and they are thereby "enabled to earn and did earn profits upon which they paid income tax, and which without the said premises and their use in and for carrying on their business would be much less in amount." And, further, that to enable them to earn the profits upon which they are assessed to the income tax "the possession and employment as aforesaid of such premises were essentially necessary, and except for the purposes of and employment in their business of such premises the respondents would not possess them. They did not possess them as investments or for the purposes of investments. If any house lost its licence the respondents as soon as possible got rid of it." Accepting these facts, it seems to me that every argument which goes to shew that the retail seller of beer can deduct what he pays in respect of the compensation levy applies with equal force in favour of the wholesale seller of beer in respect of what he pays as his proportion of the compensation levy.

Thus far I have approached the question without regard to authorities, but I think the authorities are in no way opposed to this view. In the language of Lord Herschell in *Gresham Life Assurance Society* v. *Styles* (1), the balance of profits and gains upon which duty is to be assessed is "the balance arrived at by setting against the receipts the expenditure necessary to earn them." And the Master of the Rolls (Lord Collins) in *Strong* v. *Woodifield* (2) said: "It seems to me . . . . that all expenses necessary for the purpose of earning the profits may properly be deducted, but that expenses to come out of the profits after they have been earned cannot be deducted." And there are other authorities to the like effect.

(1) [1892] A. C. 309, 323. (2) [1905] 2 K. B. 350, 356.

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Cozens-Hardy M.R.

Channell J. held, and in my opinion quite correctly, that the landlord's share of the compensation levy is a charge upon the landlord, payable by him, but chargeable and collectable for the Crown through the tenant. But he held that it could not be said to be exclusively for the purposes of the brewer's trade when it was really a sum paid to secure the retail trade and not the wholesale trade. Channell J. said that he came to that conclusion with considerable doubt and hesitation. With the utmost respect for that learned judge, I am unable to agree with his view. I regard this sum as a payment essential to the earning of the profits and not as a deduction from the "balance of profits" within the meaning of r. 1 applicable to the first and second cases. I think the Commissioners arrived at a right conclusion and that this appeal ought to be allowed.

FARWELL L.J. I am unable to agree with Channell J. in this case.

The Crown is entitled to income tax on the profits or gains of the business carried on by the company. Their business is stated in the case to be that of brewers and sellers of beer. In order to enable them to sell their beer in larger quantities and to greater advantage the company have acquired a number of tied houses. The case finds in paragraph 3 that this was done "as part of their business and as a necessary incident of the profitable exploitation of such business," and that thereby "the respondents were enabled to earn, and did earn, profits upon which they paid income tax, and which, without the said premises and their use in and for carrying on their business, would be much less in amount." And paragraph 4 runs thus: "The profits of the respondents had always been greatly increased by reason of the employment and use of such premises in and for the purposes of the respondents' business, and to enable the respondents to earn the profits upon which they were assessed to the income tax the possession and employment as aforesaid of such premises were essentially necessary, and except for the purposes of and employment in their business of such premises the respondents would not possess them. They did not possess them as investments or for the purposes of investments. If any

house lost its licence the respondents as soon as possible got rid of it." This finding shews that the money was "wholly and exclusively laid out or expended for the purposes of the trade," and Channell J. at p. 722 of the report says that he thinks that "the annual expense of having tied houses might be allowable as a deduction." The Income Tax Acts expressly forbid certain deductions which might be thought allowable before the true profits of a trade could be ascertained, but with this exception "profits of a trade" bears its ordinary signification as used by business men in business. Several definitions of profits by eminent judges are set out in Dowell's Income Tax Laws, 6th ed. p. 185. Lord Herschell's in *Russell* v. *Town and County Bank* (1) may be cited as an illustration: "The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning these profits." The compensation levy under the Licensing Act, a portion of which it is sought to deduct, is imposed and made payable as part of the excise. It is paid in the first instance by the tenant, but the landlord is bound to allow the deduction of a proportionate part, according to the length of the term, from the rent. It is, therefore, in effect a statutory imposition on landlord and tenant in proportions varying according to their respective interests and necessarily payable as a term of the use of licensed premises.

Now it cannot, I think, be doubted that the tenant is entitled to deduct the proportion borne by him in estimating his profits. It is a payment necessary for the purpose of enabling him to carry on, and to earn, profits in his trade. His trade is the sale of beer by retail, and the brewer's business is the sale of beer wholesale. These sales may be made to persons under no obligation to buy from him exclusively, or to persons under such obligation, or partly to one set and partly to the other. It is plain, and the Commissioners find, that the total sales are largely increased by the ownership of tied houses, but the brewers cannot own and use such houses without paying to their tenants the due proportion of the levy. If they had not these means of increasing their sales their profits would be less. To

(1) 13 App. Cas. 418, 424.

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Farwell L.J.

put a concrete case: Brewers sell x barrels without tied houses and make 1000*l.* yearly profit; they sell x plus y barrels with tied houses and make 1500*l.* profit; the payment of the levy in respect of these tied houses was necessarily made for the purpose of enabling them to sell the y barrels, and the Crown, claiming tax on the 500*l.* resulting as the profit therefrom, or, in other words, claiming a share of the profits (for the tax is a part of the profits), is bound to allow a deduction for a compulsory payment without which these particular profits could never have been earned at all.

The Solicitor-General entirely ignored the brewers' trade as wholesale sellers, and urged that they were merely owners and that land or house owning is not a trade, and he put the case of an owner who was not a brewer, and argued that as he could claim no deduction neither could the owner who was a brewer. But the non-brewer owner makes no profits from a trade of wholesale beerselling, and there is therefore nothing from which to claim a deduction. The brewer does make such a profit, and it is because the Crown claims a share of such profit that he claims to be allowed to make this deduction. I fail to see the force of the argument that because A. does not trade and therefore makes no profits, therefore B. who does trade and make profits should not be allowed to make a deduction merely because A. who makes a compulsory payment submits without attempting to recoup himself by putting the privilege in respect of which it is made to profitable use: it is just because B. does put it to profitable use that the question arises at all; if he did not the Crown would get nothing, because there would be no profits of which the Crown could claim a share. This shews the distinction between *Brickwood & Co.* v. *Reynolds* (1) and the present case. The owner of a house, whether tied or not, is the owner of property which falls under Sched. A: he may or may not, according to the circumstances of the case, also earn profits which are taxable under Sched. D. On the findings of fact in that case (which were very different from the present) it was held that the brewers did the repairs in question in that case as owners, and if the levy could not be deducted under Sched. A

(1) [1898] 1 Q. B. 95.

it could not be deducted under Sched. D, because it was an outgoing that did not properly come into the trading account under Sched. D. But in the present case the profit of the wholesale trade is the matter in question, and could not have been made without the tied houses, on the owner of which this statutory payment is imposed. The matter is entirely different, and the facts proved in the case render a judgment against the Crown, in my opinion, inevitable. I cannot agree with Channell J.'s statement that the payment is made for the purpose of insuring against the loss of the tenant's trade, in which the brewery company is only indirectly interested. The payment is made because the Legislature has compelled it as a term of the ownership of a licensed house, and it is worth the while of the company to acquire houses and pay it in order to increase their own sales of beer in which they have a direct interest and out of the profits of which the Crown claims a share. The tenant makes his own profit by his retail trade; the brewer makes his by his wholesale trade: the levy must be paid by each in his due proportion to enable those profits to be made, and out of each set of profits the Crown claims a share and must allow proper deductions accordingly.

I am therefore of opinion that this appeal ought to be allowed, with costs here and below.

KENNEDY L.J. In my opinion the conclusion at which Channell J. arrived was right. As I have the misfortune, in taking this view, of differing from the Master of the Rolls and Farwell L.J., and the difference is upon a matter of importance to the revenue of the country and to a large trading interest, it becomes my duty to try to make clear the reasons which have guided my judgment.

The appellants here are a large brewery company. As their title denotes, the business of the concern consists in the manufacture of beer and the sale of the product. According to paragraphs 3 and 4 of the case, which, of course, we must entirely accept so far as they state substantial facts—though such expressions as a "necessary incident of the profitable exploitation of such business" and "premises which were

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Kennedy L.J.

employed . . . . as substantially part of their plant or outfit" are rather vague and metaphorical phrases than statements of fact—such a brewery company cannot be worked in the most profitable way unless by the acquisition of freehold or leasehold premises. It acquires and maintains the ownership of licensed houses, whose tenants can be bound by covenant with the company which is their landlord to buy solely from that company all the beer which is required by the tenants for sale by retail in the licensed houses. It is to be taken for the purposes of our judgment—this is the pith and substance of paragraphs 2 and 3 of the case—that the possession of such "tied" houses is essential for the earning by the appellants of the profits upon which they are assessed to the income tax. They seek to become and remain the landlords of licensed premises only as a market-producing and not as a rent-producing investment. If the premises happen to lose their licence, the appellants get rid of their ownership as soon as they can.

The question for decision on this appeal arises in the following way. By the Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3, sub-s. 1, quarter sessions are enabled and, except they can certify that it is unnecessary, are bound yearly to impose in respect of all existing on licences within their area charges at certain graduated and proportional rates. By s. 3, sub-s. 2, charges payable by licence-holders under this section in respect of any licence must be levied and paid by the licence-holder together with, and as part of, the duties on the corresponding excise licence. By s. 3, sub-s. 3, the licence-holder who pays a charge under this section may "make such deductions from rent" as are set out in the Second Schedule to the Act, and if his landlord is himself a lessee such landlord may in his turn make a deduction from the rent payable to his lessor. By s. 3, sub-s. 4, the sums so paid to quarter sessions are to constitute the compensation fund of the district for the benefit of the persons interested in licensed premises in respect of which an on licence is not renewed under ss. 1 and 2 of the Act.

The scheme of this legislation, from the economic standpoint, may be summed up as the creation of a compulsory mutual insurance on the part of those who are interested either as

landlords or as tenants of licensed premises within the district against loss to their respective interests resulting from the non-renewal of the tenant's licence. The annual levy or charge under s. 3 of the Act paid immediately by the tenant, who is entitled partly to recoup himself by a deduction from the rent, represents the premium to which both contribute in respect of each licence; and when any licence within the district is not renewed under the provisions of ss. 1 and 2 of the Act the landlord and the tenant affected get, in the form of compensation under the Act, the benefit of the insurance fund which has been created by the aggregation of the premiums paid by all landlords and tenants of licensed houses within the district in the form of the compensation charge levied upon the tenant under s. 3 and paid by him with and as part of the excise duties.

The appellants, as owners of licensed houses in various districts, are annually compelled, as appears from paragraph 5 of the case, to allow, and they have allowed, to their tenants such deductions from rent as are provided for by s. 3. And they have in their turn, when paying rent in respect of such of the said premises as are rented by them, deducted from such rents such amounts as are authorized by the Licensing Act. After allowing for such recoupments the appellants remain, as landlords, greatly out of pocket in respect of deductions from rent made by the tenants of their "tied" houses under the Act; and the question raised by the case is whether they are or are not, in the calculation of the balance of profits in respect of their trade of brewers chargeable to income tax under Sched. D, entitled to make a deduction on account of so much of these deductions from rent under the Licensing Act, 1904, s. 3, as they have had themselves to bear without recoupment. Channell J., for reasons which he has expressed in a very careful judgment, has held that they are not entitled to make such a deduction, and the present appeal is an appeal against that decision.

The argument on their behalf may, I think, fairly be stated thus: "The case states as a fact that it is a proper and necessary part of the conduct of such a brewery business to own tied houses, in order to make profits; unless we had owned the 'tied' houses whose tenants have by virtue of the Licensing Act, 1904,

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Kennedy L.J.

s. 3, made the deductions from the rents payable to us as landlords we could not have made the profits assessable to income tax under Sched. D. As the ownership of these 'tied' houses is essential in order to earn our profits and it is under the Licensing Act, 1904, a necessary incident of such ownership that we should have to allow these deductions from the tenant's rent, it is right and in accordance with the Income Tax Act, 1842, that, in estimating the balance of profits assessable to income tax, we should deduct the amount of so much of these deductions from tenants' rents as we have been obliged ourselves to bear. Our case comes within the statement of the law made by Lord Herschell, 'The profits of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning these profits'": *Russell* v. *Town and County Bank.* (1)

This argument appears, I agree, on the first blush, attractive. Its reasoning seems, by a single stroke as it were, to cut the Gordian knot of the difficult question we have to consider. Nevertheless, although with diffidence—for the argument has approved itself to the Master of the Rolls and Farwell L.J.—I am not satisfied of its soundness. It is clear that it is not every expenditure which is made by a trader for the promotion of his trade, and which in fact contributes to the earning of profits, which is a permissible deduction from the estimate of profits for income tax purposes. One may usefully refer to the judgments in *Watney & Co.* v. *Musgrave* (2) (though some of the language of Kelly C.B. in that case may be open to criticism), the judgment of Charles J. in *Dillon* v. *Corporation of Haverfordwest* (3), and especially to the judgments of A. L. Smith L.J. and Rigby L.J. in *Brickwood & Co.* v. *Reynolds* (4), for illustration and authority upon this point. It is not permissible to depart from the express terms of Sched. D, 1st and 2nd cases, r. 1. That rule prescribes that in estimating the balance of profits and gains assessable to income tax in respect of any trade no sum shall be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly laid out or expended

(1) 13 App. Cas. 418, 424.
(2) 5 Ex. D. 241.
(3) [1891] 1 Q. B. 575, 584.
(4) [1898] 1 Q. B. 95.

for the purposes of that trade. "It is not enough," said Lord Davey in *Strong & Co.* v. *Woodifield* (1), "that the disbursement is made in the course of or arises out of or is connected with the trade, or is made out of the profits of the trade; it must be made for the purpose of earning the profits." By the expression "for the purpose" Lord Davey clearly intended, for the rule which I have just quoted so says, "for the sole and exclusive" purpose. In the same case (2) Lord Loreburn L.C. pointed out that "it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade."

It appears to me, in the first place, assuming that the deductions from the income which in the form of rent the appellants draw from the tenants of their tied houses can properly be held to constitute "disbursements" or "expenses" within the meaning of the rule, that this diminution of rent is too remotely connected with the earning of the appellants' trade profits to be properly allowable as a deduction from these trade profits. The rents of the "tied" houses do not form part of the trade profits; and it is the rent receipts which are diminished by the tenants' deductions under the Licensing Act, 1904, s. 3. It must be taken, upon the facts stated in the case, that the appellants' ownership of tied houses is an essential element in the profitable working of their brewery business, because a secure market for their beer is thus acquired; but it is an equally undeniable fact that it is the revenue of the appellants as rent receivers, and not either the volume or the profitableness of their trade with the tenants, that is affected by the tenants making the statutory deductions from rent.

In the second place, again assuming that the diminution of the appellants' income as landlords under the Licensing Act, 1904, s. 3, comes within the category of "disbursements" or "expenses," I have to ask myself the question, Is it "money wholly laid out or expended for the purposes of the appellants' trade"? It seems to me, as it has seemed to Channell J., that it does not satisfy this requirement of the income tax rule.

(1) [1906] A. C. 448, at p. 453. (2) Ibid. at p. 452.

C. A. 1909

SMITH v. LION BREWERY COMPANY, LIMITED.

Kennedy L.J.

This point is put clearly and forcibly in the concluding portion of my brother Channell's judgment, but in a few sentences I will state it in the form in which it presents itself to me.

The compensation charge in respect of which the publican tenant makes the deduction from the rent payable to his landlord, whether brewer or not, as I have already said, is in truth a premium for the insurance of the continuance of his right to carry on the licensed retail trade on the premises which his landlord has let to him; it goes with similar premiums paid by other licence-holding publicans within the same licensing district to form the fund out of which compensation is paid to landlord and to tenant if the licence is not renewed under ss. 1 and 2 of the Licensing Act, 1904. The purpose of paying the premium is no doubt primarily to maintain the licence which enables the publican tenant to carry on his licensed business. Indirectly the landlord, whether he be a landlord simply or a landlord who sells beer to the tenant for sale on the premises, is interested also in the maintenance of this trade on the premises; and his interest in the latter case is much greater; and he is further interested, though in this case simply as a landlord, in the creation of the district compensation fund which is formed out of these premiums. But in these circumstances I feel myself unable to say that the share of the compensation levy which is borne by the appellants as landlords is a sum of money wholly laid out or expended for the purpose of their trade as brewers. It is primarily and partially a payment for the maintenance of the publican's licensed business.

For these reasons, although, after hearing the arguments so forcibly put by the learned counsel for the appellants and knowing that they have satisfied my colleagues in this Court, I cannot say with Channell J., as he does at p. 717, that this case is fairly clear—on the contrary I feel that it is a difficult case—I am upon the whole of opinion that the appeal should be dismissed. But as the majority of the Court think otherwise, this appeal will be allowed.

Appeal allowed.

Solicitors: *Godden, Son & Holme; Solicitor of Inland Revenue; Wingfield, Blew & Kenward.*

H. C. R.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D
1909
March 18, 29.
C. A.
1909
July 13, 14.

SAILING SHIP "LYDERHORN" COMPANY, LIMITED *v.* DUNCAN FOX & CO.

Ship—Charterparty—"Ready for loading"—Discharge of previous Cargo—Cancellation.

By a charterparty of November 15, 1907, it was agreed between the plaintiffs and the defendants that the ship *Lyderhorn* should proceed to load at Iquique and Caleta Buena and there receive from the agents of the defendants a full cargo of nitrate of soda. Twenty-five lay days were to be allowed to the merchants for loading the ship and for waiting orders abroad; lay days to be reckoned from the day after the master should give notice to charterers' agents of being ready to receive cargo and not to commence before January 1, 1908, at the respective ports, and to cease when they should give him notice that he was at liberty to proceed to sea. Stiffening of nitrate to be supplied as required at Iquique, but not before December 10, on receipt of forty-eight hours' notice from captain of his readiness to receive the same. Time occupied in discharging ballast or in shifting ports not to count as lay days. Demurrage was provided for. Freight was payable at 16*s.* a ton. "Should the vessel not have arrived at her loading port and be ready for loading (in accordance with this charter) on or before noon of January 31, 1908, charterers to have the option of cancelling this charter." At the date of the charterparty the *Lyderhorn* was at Caleta Buena discharging a cargo of coal and intended to complete her discharge at Iquique. She arrived at Iquique on December 13, and by January 27, 1908, had discharged as much of her cargo of coal as could safely be unladen without some stiffening. The captain therefore gave notice to the defendants' agents that he required 700 tons of nitrate for stiffening, but they refused to supply it unless he would agree to redeliver it if the charterparty were cancelled. It was admitted that the whole of the coal could not have been discharged by noon of January 31, 1908. The defendants on that day cancelled the charterparty, and the shipowners brought this action to decide whether they were entitled to do so, and for damages:—

Held by Lord Alverstone C.J. and by the Court of Appeal, that the vessel was not ready for loading within the meaning of the charterparty, and that the defendants were entitled to cancel it.

TRIAL of action before Lord Alverstone C.J. without a jury Liverpool Assizes.

The following statement of facts is taken substantially from the judgment of the Lord Chief Justice.

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

The plaintiffs were the owners of the sailing ship *Lyderhorn*. The action was brought to recover damages from the defendants, who were the charterers of the vessel, for alleged breaches of a charterparty dated November 15, 1907, and made between the plaintiffs and the defendants.

At the date of the charterparty the vessel was at Caleta Buena discharging a cargo of coal and intending to complete her discharge at Iquique, distant some forty miles. In these circumstances the plaintiffs and defendants entered into the charterparty, of which the following are the material clauses :—

"It is this day mutually agreed between Sailing Ship Lyderhorn Company, Limited (Messrs. C. E. De Wolf & Co.) of the good ship or vessel called the *Lyderhorn* of 2687 tons register measurement or thereabouts now at Caleta Buena discharging completing at Iquique and Duncan Fox & Co. of Liverpool merchants

"1. That the said ship shall with all convenient speed proceed to load at Iquique and Caleta Buena or as near thereunto as she may safely get, and there, being tight, staunch and strong, and in every way fitted for the voyage, receive from the factors or agents of the said merchants a full and complete cargo of nitrate of soda in bags, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture.

"4. Twenty-five working lay days, the word working to exclude surf days, Sundays, and all other holidays, whether ecclesiastical or civil, are to be allowed the said merchants for loading the said ship and for waiting orders abroad. Lay days shall be allowed to be reckoned from the day after the master gives notice in writing to charterers' agents of being ready to receive cargo, and not to commence before January 1, 1908, at the respective ports, and to cease when they give him notice in writing that he is at liberty to proceed to sea. Stiffening of nitrate to be supplied as required at Iquique, but not before December 10, on receipt of forty-eight hours' notice from captain of his readiness to receive same."

(In the printed form of charterparty before alteration this sentence ran as follows : "Stiffening of nitrate to be supplied at

loading port as required on receipt of forty-eight hours' notice from captain of his readiness to receive same, but not before date fixed as above for commencement of loading or lay days to count.")

"In case of any dispute regarding the number of working lay days employed in loading cargo, or which could have been so employed, it shall be decided by reference to the captain of the port of loading, whose certificate shall be binding on charterers and on the captain.

"Time occupied in discharging ballast or in shifting ports not to count as lay days.

"If charterers supply cargo free alongside ship at the rate of 250 tons per working day (which quantity the master is obliged to receive) the rate of freight is to be reduced 1*s.* per ton.

"5. And should the said vessel be detained by the said charterers or by their agents beyond the time before specified for loading or discharging the said cargo in the aforesaid port, demurrage shall be paid daily to the said master, or his order, as same shall become due, at the rate of £4*d.* British sterling per register ton per day, for each and every day's detention afterwards, such detention not to exceed ten running days. And should the vessel be unnecessarily detained by the master beyond the time herein specified, demurrage shall be paid by him at the same rate and in the same manner to charterers or to their agents. Should the vessel be unnecessarily detained at any other period of the voyage, such detention to be paid for by the party delinquent to the party observant at the above named rate of demurrage. Sufficient cargo to be supplied at Iquique to enable the vessel to shift to Caleta Buena in safety."

By clause 11 freight was payable at 16*s.* a ton.

"13. Should the vessel not have arrived at her loading port and be ready for loading (in accordance with this charter) on or before noon of January 31, 1908, charterers to have the option of cancelling this charter."

The *Lyderhorn* arrived at Iquique on December 13, 1907, having then on board rather more than half her cargo—some 2800 tons. At Iquique vessels discharge in the roads. On January 20, 1908, she had still 1200 tons of coal on board. By January 27 she had discharged as much of her coal as could

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

safely be unladen unless some stiffening in the way of ballast, or sufficient cargo, was put on board. The captain thereupon gave notice to the defendants' agents as follows:

"I beg to give you forty-eight hours' notice that the British barque *Lyderhorn* now in the port of Iquique has discharged her coal cargo down to stiffening and cannot discharge with safety after 5 P.M. to-day. I will now kindly ask you that you will give to *Lyderhorn* 700 tons of nitrate stiffening as stipulated in the nitrate charterparty dated Liverpool, 15th November, 1907."

The agents of the defendants on January 27 refused to supply nitrate for stiffening except at the ship's risk and expense and without prejudice to the charter being cancelled. The captain on the same day replied that his vessel was ready to receive 700 tons of stiffening as per charterparty and again demanded it, but the agents on January 29 refused to give the stiffening unless the captain would agree to redeliver it if the charterparty was cancelled. It was admitted by the plaintiffs that the coal remaining on board the vessel on January 29, when the stiffening notice expired, could not have been discharged by noon on January 31, the day on which the ship was to be ready to load by clause 13 of the charterparty.

Demurrage notes were then delivered by the captain to the defendants' agents, and on January 31 the defendants' agents cancelled the charterparty, purporting to exercise their option contained in clause 13 of the charter. Freights having fallen, the vessel was on February 6 rechartered by the defendants on a charterparty which contained similar terms, but at a rate of 13*s.* per ton instead of 16*s.*, the rate in the charterparty of November 15, 1907.

The question in the case was whether, in the circumstances, the defendants were justified in cancelling the charterparty.

Horridge, K.C., and *G. D. Keogh*, for the plaintiffs.
L. Sanderson, K.C., and *Leslie Scott, K.C.*, for the defendants.

Cur. adv. vult.

March 29. LORD ALVERSTONE C.J. delivered a written judgment which after a statement of the facts proceeded as

follows: The short point which has to be decided is whether on January 27, 1908, when the captain gave notice that his vessel required the stiffening, she was ready to load within the meaning of clause 13 of the charter. For the purposes of the action the solicitors for the plaintiffs and defendants admitted that on January 27 the *Lyderhorn* was down to stiffening point, and that the defendants or their agents had notice of it on that day; and the plaintiffs admitted that between the time when the stiffening notice had expired on January 29, 1908, and noon on January 31 the coal remaining on board at the expiration of the stiffening notice on January 29 could not have been discharged by noon on January 31, the date and time by which the ship was to be ready to load or the charterers might cancel under clause 13.

It was contended by the plaintiffs that, inasmuch as by the terms of clause 4 stiffening of nitrate was to be supplied as required at Iquique on receipt of forty-eight hours' notice from the captain of his readiness to receive the same, and further inasmuch as time occupied in discharging ballast was not to count as lay days, the ship was ready to load in accordance with the charter when the captain gave notice on January 27 that he was ready for stiffening.

It was further contended by the plaintiffs that, inasmuch as both parties knew that the vessel was discharging cargo at Iquique and would require stiffening, the ship was, for the purpose of the mutual rights and obligations of the parties, ready to load when she could receive cargo, whether for stiffening or other purposes; and also that putting nitrate on board for stiffening was loading the vessel, the only difference being that the time occupied in loading the stiffening was not to count as lay days.

It was contended by the defendants that the effect of clauses 4 and 13 taken together was that the charterers were bound to supply stiffening at any time after December 10, 1907, but that under no circumstances were lay days to commence running until January 1, 1908; and that if the vessel was not ready to receive cargo other than stiffening by January 31 she was not ready for loading in accordance with the charter, and that the charterers were therefore justified in cancelling the charter.

The point is one of considerable difficulty. In my opinion it

1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

Lord Alverstone C.J.

cannot be successfully contended that the nitrate put on board was not part of the ship's load. It was agreed that it would be discharged at the end of the voyage and that freight would be paid upon it. On the other hand it was contended by the defendants that under ordinary circumstances a charterer is entitled to the full reach of the holds and of the carrying capacity of the vessel before he can be called upon to put cargo on board, and that therefore the supply of nitrate as stiffening in order to enable the vessel to remain in the roads was a provision inserted for the benefit of the shipowner, and did not deprive the charterer of his right to cancel if the vessel was not entirely free of the inward cargo by noon on January 31.

In my opinion the defendants are right and this vessel was not ready to load within the meaning of clause 13. The charter-party, by clause 4, clearly contemplates that the stiffening may be demanded as early as December 10, but that, even though it be supplied, demurrage days are not to commence until January 1, 1908, or, in other words, notice cannot be given that the ship is ready to receive cargo before January 1. The time occupied in discharging the part of the cargo still on board might be very uncertain; in this case it was proved that by January 20 the vessel still had 1200 tons on board, and was not down to her stiffening point until January 27. There is undoubtedly an obligation on the defendants to supply nitrate to take the place of stiffening afforded by the last part of the ship's outward cargo, and the shipowner was not under this charter obliged to find ballast to keep his ship in a condition of safety; but it seems to me that this privilege, which might necessitate nitrate being supplied for several days while the remainder of the coal was being discharged, cannot be used to increase the burden upon the charterers or to alter the other terms of the contract so far as they were concerned. Unquestionably while the cargo was being discharged the charterers could not have the full and free use of the ship's winches and other tackle for the purpose of putting nitrate on board, and the nitrate must have been supplied to the ship under circumstances quite different to those which would exist when the vessel was being loaded in the ordinary course, all her cargo having been discharged. Moreover, it is to be

observed that the supply of stiffening on the request of the master might be an intermittent operation; the captain might demand stiffening if required any day after December 10, 1907, and might wait some days until he required more, as the charterer was bound to supply nitrate for stiffening as required. The contention of the plaintiffs, that the only effect of this clause was to enable the charterers to exclude from the lay days time occupied in discharging ballast, does not seem to me correct. I doubt whether under the circumstances of this case the words "time occupied in discharging ballast . . . . not to count as lay days" have any application. That which had to be discharged was not ballast, but inward cargo necessary for stiffening, the place of which, for the purpose of stiffening, was to be taken by the nitrate. Further, it seems to me that the stipulations in clause 4 enabling the shipowners to demand stiffening on December 10, and preventing them from giving notice that their ship was ready before January 1, 1908, and the stipulation in clause 13 allowing them time until January 31 to give the notice that the ship was ready to receive cargo, all support the view I take that the supplying of nitrate for stiffening was not supplying cargo in the ordinary sense of the word, and that the ship's being ready to receive stiffening is not the same thing as being ready for loading within the meaning of clause 13.

Two authorities were cited before me—the first the case of *Vaughan* v. *Campbell, Heatley & Co.* (1), which was relied upon by the plaintiffs as deciding that a vessel might be ready to load although she had 300 tons of ballast on board. The report is very meagre, as the terms of the charterparty are not stated, but in my judgment, having regard to the conditions of the charterparty in this case, there is nothing in that decision which compels me to hold that in this case the supply of nitrate for stiffening is of necessity the commencement of the loading of the ship. The other was the case of *Groves, Maclean & Co.* v *Volkart Bros.* (2), but in my opinion that case only recognizes the general principle, which was not disputed, that in the absence of express stipulation a ship to be ready to load must be completely ready in all her holds so that the charterer may

(1) (1885) 2 Times L. R. 33. (2) (1884) 1 Cab. & E. 309.

1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & Co.

Lord Alverstone C.J.

have the disposal of the whole vessel. I do not consider that these authorities can be said to lay down any principle which conflicts with the view which I have expressed. I have carefully considered the judgment in a German case which was cited by Mr. Horridge. It seems to me that the terms of the charter were very different, and I decide this case substantially on the construction which I put upon the charter. The words at the end of clause 5, "sufficient cargo to be supplied at Iquique to enable the vessel to shift to Caleta Buena in safety," do not seem to me to assist the plaintiffs materially, because it might well be that a vessel would require more cargo to go in safety to Caleta Buena than would be necessary as stiffening for her safety as long as she remained in the roads at Iquique.

For the above reasons I am of opinion that the vessel was not ready to load within the meaning of clause 13, and that judgment must be given for the defendants.

Judgment for the defendants.

W. H. G.

The plaintiffs appealed.

July 13, 14. *Horridge, K.C.*, and *G. D. Keogh*, for the appellants. The right to cancel the charterparty is conferred by clause 13 only in case the vessel should not have arrived at her loading port and be ready for loading before noon on January 31, 1908. She arrived at her loading port on December 13, 1907. Therefore the only question is whether she was ready to load in accordance with the charter before noon on January 31. She was ready to load when she was ready for stiffening, and that was on January 27. The stiffening of a ship is part of her cargo. Freight is paid upon it and it is delivered with the rest of the cargo to the consignees at the port of discharge. A ship is therefore loading when she is taking stiffening on board and is ready to load when she is ready for her stiffening. The conditions therefore never arose under which the defendants were empowered to cancel this charterparty. The stiffening of the ship with nitrate was really loading her with part of her cargo, and in the ordinary course the time occupied in that way would have been reckoned as lay days. In the original printed form

of this charterparty, after "forty-eight hours' notice from captain of his readiness to receive same," in clause 4, were inserted the words "but not before date fixed above for commencement of loading, or lay days to count." These words have been deleted and cannot be used to explain the construction of the charterparty, but they shew that it is the common custom to treat cargo used for stiffening as part of the general cargo. It was intended that the nitrate taken in as stiffening should be treated in this way, and that as soon as the captain gave notice that he was ready for stiffening the ship should be considered a ready ship and the right to cancel the charterparty should cease. There was no reason why on the terms of this contract all the coal should have been taken out by January 31; for the charterparty does not contain the usual words "clear of inward cargo." The rule is thus stated in Carver's Carriage by Sea, 4th ed., s. 221: "The vessel is not 'ready to load' within the meaning of such a clause, unless she is discharged and ready in all her holds, so as to give the charterer complete control of every portion of the ship available for cargo; except so much as is reasonably required for ballast to keep her upright." The shipowners were within that exception and were obliged to keep some of the coal on board till they received nitrate as stiffening: *Groves, Maclean & Co.* v. *Volkart Bros.* (1); *Vaughan* v. *Campbell, Heatley & Co.* (2) If the charterers had supplied the nitrate the shipowners would have unloaded all the coal; the charterers did not perform their part of the contract and were not entitled to have the ship clear of ballast, nor can they take advantage of clause 13. The provision that nitrate should be used as stiffening was inserted for the benefit of the charterers to give them the use of so much of the ship as they would otherwise have been entitled to: *Towse* v. *Henderson.* (3)

L. Sanderson, K.C., and *Leslie Scott, K.C.*, for the charterers. This is a simple question whether in fact the ship was ready to load on January 31. The rule is well settled that "ready for loading" means that the charterer has complete control of every portion of the ship available for cargo. No doubt cargo may be

(1) 1 Cab. & E. 309. (2) 2 Times L. R. 33.
(3) (1850) 4 Ex. 890; 19 L. J. (Ex.) 163.

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

used for ballast, but in this case there was a considerable amount of coal still on board on January 31, which had to be taken out before the ship could be ready for loading. The charterparty provides for two distinct notices; and notice that the ship is ready for stiffening is not the same as notice that she is ready for loading. To be "ready for loading" she was to be a ship stiffened with nitrate but otherwise empty. It appears from the shorthand note of the judgment in *Vaughan* v. *Campbell, Heatley & Co.* (1) that that case turned entirely on a question of fact and laid down no general principle.

Horridge, K.C., in reply.

COZENS-HARDY M.R. This appeal raises a question of the construction of a charterparty and a question, undoubtedly, of some difficulty; but upon the whole I have come to the conclusion that the interpretation the Lord Chief Justice has put upon it is correct. The clause in the charterparty upon which the action was taken is clause 13: "Should the vessel not have arrived at her loading port and be ready for loading (in accordance with this charter) on or before noon of January 31, 1908, charterers to have the option of cancelling this charter." Before considering some of the clauses in detail I should mention this: that it seems apparent that the bargain on the one side and on the other was this—that the charterers should have the whole of the space in the vessel for their nitrate, and that, on the other hand, the shipowners should not have the right, which but for this stipulation they might have had, to say that they would provide what was necessary for a sailing ship, either in the shape of ballast or in the shape of freight-paying cargo which might take the place of ordinary ballast. But then what is the obligation involved by clause 13? When is a ship ready for loading? I think that the authorities really decide that, and I cannot put it better or more accurately than by using the language which has been adopted by counsel on both sides. It is this: that a vessel is not ready to load unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo, except so much as is

(1) 2 Times L. R. 33.

reasonably required for ballast to keep her upright. What does that mean in a charterparty like this? The ship had to be, before January 31, tendered as an upright ship, a discharged ship ready for loading in the sense which I have referred to. Moreover, she had to be a ship rendered upright and safe by being stiffened, not with ballast, not with coal, but with nitrate; that nitrate having to be provided by the charterers, as and when requested by the captain, to take the place of the coal which would have to be moved, but required and provided in such time and under such circumstances as to enable the ship to be discharged of all strange cargo on January 31, so that the charterers might be able to use every portion of the space of the ship and to stow their cargo in what manner they might think fit. Now is there anything in this charterparty inconsistent with that? Clause 13 not merely says that the vessel must be ready for loading on or before noon of the 31st, but must be ready for loading in accordance with this charter. What does that mean? That means, it seems to me, stiffened not with coal, but stiffened with nitrate. We must go back to clause 4. Clause 4 seems to be inconsistent with the very elaborate and careful argument of Mr. Horridge. It contemplates, in language which I will read, two notices. It says that twenty-five working lay days are to be allowed the merchants for loading the ship and for waiting orders abroad. "Lay days shall be allowed to be reckoned from the day after the master gives notice in writing to charterers' agents of being ready to receive the cargo"; that is to say twenty-four hours' notice, but not to commence before January 1. Then "Stiffening of nitrate to be supplied as required at Iquique, but not before December 10, on receipt of forty-eight hours' notice from captain of his readiness to receive the same." Therefore two notices are provided for; one a notice that stiffening is to be supplied at forty-eight hours' notice, and the other a notice of something different and distinct, namely, that the ship is ready to receive cargo, that being a twenty-four hours' notice on which alone the lay days would have run. That was really the view which the parties throughout this transaction themselves had taken. On January 27 the master gave this notice: "I beg to give you forty-eight hours' notice that the British barque

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & Co.

Cozens-Hardy M.R.

Lyderhorn now in the port of Iquique has discharged her coal cargo down to stiffening"—not completely discharged it of course—"and cannot discharge with safety after 5 P.M. to-day. I will now kindly ask you that you will give to *Lyderhorn* seven hundred tons of nitrate stiffening as stipulated in the nitrate charterparty dated Liverpool, 15th November, 1907."

In my view, on this charterparty the ship could not be said to be ready for loading in accordance with the charter so long as she had a foreign cargo on board taking up part of the space in the ship to the use of which the charterers were entitled. Then it was said there was something in the latter part of clause 1 which ought to drive one to a different conclusion. It is said that the words "time occupied in discharging ballast or in shifting ports not to count as lay days" ought to induce us to put a different construction upon the charterparty. I am unable to follow that argument. That clause seems to me to contemplate two events, neither of which happened. The ballast was not discharged and there was no shifting of ports; and even if those events had happened, as at present advised, I should not be prepared to give the importance to those points which Mr. Horridge has attached to them.

In my view, on the facts of this case, and the event which is contemplated by clause 13 having happened, the charterers exercised an option which they were entitled to exercise, and they duly and properly cancelled the charter.

FARWELL L.J. I am of the same opinion. This charter appears to me to provide for two distinct matters; first of all the provision by the shipowners of a vessel ready for loading in accordance with the charter on or before January 31, 1908. That means a vessel discharged in all her holds, and also with sufficient stiffening—that is, with sufficient ballast on board to keep her upright. In the absence of any further contract it would be the duty of the shipper to tender the ship so standing upright either by means of ballast, or, as stated by Parke B. in *Towse* v. *Henderson* (1), by goods or merchandise taken by the shipowner himself in lieu of putting in ballast, whichever he

(1) 4 Ex. 890; 19 L. J. (Ex.) 163.

thinks fit. That latter part is the matter to which the second head of this contract refers. In lieu of doing that it was arranged between the parties that the stiffening should be provided in the manner pointed out in clause 4. If it were not for that clause it is plain, whether it be ballast or whether it be freight, the shipowner is the person who would have to get it and put it there; and the ship would not be ready until she was properly stiffened. The provision for stiffening the ship is quite distinct from the stipulation that the ship shall be ready for loading, and provides for a separate notice being required and being given. The ship has not been properly stiffened by reason of the default of the shipowner, and, therefore, there is the breach provided for by clause 13. With regard to the provision that time occupied in discharging ballast was not to count as lay days, in my opinion that expression cannot limit or render nugatory the express provision contained a few lines above in the same charter. With regard to Mr. Horridge's arguments as to the portions that are struck out, I do not think we are entitled to look at the portions that are struck out. If we do, his argument is open to the retort that the parties thought that that was not a proper arrangement to enter into. Speaking for myself, I do not think we are entitled to treat this as distinct from a clean copy because we are supplied with the actual words which were struck out. On a question of construction I do not think parol evidence is admissible to shew what was put forward by one party and rejected by the other. I agree, therefore, that the appeal must be dismissed.

KENNEDY L.J. I think so too. We have but one question to solve, which is, Was this vessel on January 31, 1908, ready for loading in accordance with the charterparty? It is an agreed fact that she was not, because it was admitted at the time when the question arose first between the parties that she could not have become a ready ship on the 31st, unless it was consistent with such readiness under the charter that she had on board, still in her holds, a considerable portion of an inward cargo yet to be discharged before she could be cleared. Now, in the very able argument we have heard for the appellants, it is said that

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

Kennedy L.J.

this is a condition of readiness under the charter. In my opinion, although I agree there is a difficulty in construing this charterparty, that is not sound. It is true no doubt that, in regard to a sailing ship, she must stand upright in order to be a ship at all, and take in cargo. It is no objection to her readiness that she should be a ballasted ship, provided she contains only so much ballast as is necessary to keep her upright; and it is quite true that, according to the judgment in *Towse* v. *Henderson* (1), in the absence, of course, of stipulations to the contrary, that ballast may take a profitable form for the shipowner by the shipping of merchandise. But I have never heard of an instance, nor has one been produced, in which a man could say "I offer you a ready ship on the date on which we agreed, although I have on board, still in the space which, according to contract, your goods are to occupy, so many hundred tons of cargo to be discharged yet, at a port we are to go to." It seems to me to be inconsistent with ordinary business purposes, because it is impossible to say that a ship is at the disposal of the man who is to load her, when out of that ship is to come a quantity of cargo for a person who has to get it out of the ship at the same time that the loading is going on. It is impossible to suppose that the thing can be done without friction in the absence of some arrangement between two persons who have no connection with one another, the receiver of the inward cargo and the loader of the outward cargo.

Then, when we come to look at the terms of the charterparty by which we are governed, it is to me clear, as it is to the other members of this Court, that the arrangement was that, this being a sailing ship, she was to be loaded, whether she came in with ballast strictly so called, or with freight-paying goods as ballast, with a complete cargo of nitrate, the nitrate taking the place, so far as ballast was necessary, of ballast, and, therefore, the ship being completely loaded with the nitrate cargo. Of course, when the parties had to arrange the question of lay days—that is the time which is to be allowed for loading the cargo—they had to make some provision for the taking on board of so much of the nitrate as

(1) 4 Ex. 890; 19 L. J. (Ex.) 163.

represented the ballast necessary to keep the ship upright. They had to make special terms for that, because it might be; from time to time, if she came in with cargo, the receivers of that cargo might take their cargo out, and therefore the obligation was thrown on the charterers to provide the nitrate so far as it was required for stiffening. In this particular case that was to be done during a period after December 11, giving apparently what the parties thought was sufficient time, and that is all we have to deal with in connection with the date of January 1, after which notice might be given immediately that the vessel was ready to receive the cargo. It is said on the part of the appellants that directly the notice was given, which the charterers were bound to comply with after forty-eight hours, to supply so much nitrate as would make the ship safe while she was discharging, it was impossible from that moment for the charterers to take advantage of the cancelling clause. It seems to me it would require very strong words to make that contention a sound one on the terms of clause 4, because there is to be expressly a separate and distinct notice of readiness to load, and it is readiness to load which alone prevents the operation of the option. Now I think the words of clause 4, fairly read, mean this: "We promise you and undertake to supply the stiffening of nitrate as you require it, after forty-eight hours' notice, not before December 10, but on any date after that time, to keep your ship safe; but while that has to be done, there is nothing in the clause to prevent the operation of the ordinary law that the ship must be ready to load." When you ask what "ready to load" means, again looking at clause 4, it means "ready stiffened with a nitrate cargo, so far as it is required for safety, and ready to give all the rest of the accommodation of the ship to the cargo which is to be loaded subject to the lay days period." When I look at the clause "Time occupied in discharging ballast or shifting ports not to count as lay days," I confess I do not feel myself much pressed by it. In the first place we are not dealing with ballast; but it is possible under this charterparty the ship might have come in ballast from Iquique. It is possible, as was pointed out in the course of the argument, that she might be partly loaded under this charter-

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

Kennedy L.J.

C. A. 1909

SAILING SHIP "LYDERHORN" COMPANY, LIMITED v. DUNCAN FOX & CO.

Kennedy L.J

party, or go to or from Iquique to the other port and be loaded there. There are various contingencies provided for, and one is the possibility of her coming to Iquique in ballast. Be that as it may, I am not going to treat that as a sound construction which would alter the natural and proper meaning of clause 4 by reference to a general clause of that kind. "Time occupied in discharging ballast or in shifting ports not to count as lay days" may properly be construed, as Farwell L.J. has pointed out, by treating it as a clause providing, not for that which will happen under the charterparty, but what may happen outside it, the clause being read "Time occupied in discharging ballast, if any, or in shifting ports, if any, not to count as lay days." These provisions are obscure in their wording, and in this particular case it is difficult, and the German Courts have found it equally difficult, to construe them; but, be that as it may, the particular charterparty before us could only have, as a natural construction, the construction put upon it by the Lord Chief Justice, which we affirm.

Appeal dismissed.

Solicitors: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool; Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

H. C. R.

[COURT OF CRIMINAL APPEAL.]

1909
July 30.

THE KING *v.* CHITSON.

Criminal Law—Evidence—Cross-examination of Prisoner—Questions tending to shew Commission of another Offence—Admissibility—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (*i.*).

On the trial of a prisoner charged with having had carnal knowledge of a girl aged fourteen, the prosecutrix stated in her examination in chief that on the day after the connection had taken place the prisoner told her that he had previously done the same thing to another girl, who was alleged by the prosecution to have been under sixteen at the time. The prisoner gave evidence, and he was asked in cross-examination, and the questions were allowed by the judge, whether he had made the statement attributed to him by the prosecutrix and whether it was true. The prisoner was convicted:—

Held, that under s. 1 (*f*) (i.) of the Criminal Evidence Act, 1898, the prisoner was bound to answer the questions, because, although they tended to shew that he had committed another offence or was of bad character, the questions were admissible to shew that he was guilty of the offence wherewith he was then charged.

APPEAL to the Court of Criminal Appeal against a conviction.

The prisoner was indicted before Channell J. at the Winchester Assizes for having on March 9, 1909, unlawfully and carnally known a girl named Kate Barrow, of the age of fourteen years and nine months, contrary to s. 5 of the Criminal Law Amendment Act, 1885. The prosecutrix was a domestic servant in the employment of the prisoner at the date when the offence was alleged to have been committed. In the course of her examination in chief she stated that on the day after the connection had taken place the prisoner told her that there was another girl they had had at Portsmouth and that he had behaved the same to her, and that he hoped she (Barrow) would be as loving to him as the other girl had been.

The prisoner gave evidence and was asked in cross-examination whether he had made this statement to Barrow, and whether he

1909

REX v. CHITSON.

had not in fact had immoral relations with the other girl, whose name was Hearn, and who was suggested by the prosecution to have been under sixteen years of age at the time, though the prisoner said she was over sixteen. Letters in endearing terms, admittedly written by the prisoner to Hearn, were also put to him in cross-examination.

The questions and the putting in of the letters were objected to by counsel for the prisoner, but were admitted by the judge. The prisoner, in answer, denied that he had made the statement to Barrow and denied that he had had immoral relations with Hearn.

The jury found the prisoner guilty and he was sentenced to twelve months' imprisonment in the second division.

The prisoner appealed against the conviction.

Du Parcq, for the prisoner. The questions as to the prisoner's relations with the girl Hearn tended to shew that he had committed another offence, or that he was of bad character, and they were therefore inadmissible by reason of the provisions of s. 1 (*f*) of the Criminal Evidence Act, 1898. (1) These questions do not come within the first proviso to s. 1 (*f*), because, if the prisoner had in fact committed an offence with the girl Hearn, "proof" of that offence would not have been admissible to shew that he was guilty of having had connection with Barrow, it being clearly irrelevant to that issue.

St. Gerrans, for the prosecution, was not called upon to argue.

(1) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:— . . . .

"(*f*) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; . . . ."

1909

REX v. CHITSON.

The judgment of the COURT (Lord Alverstone C.J., Darling and A. T. Lawrence JJ.) was delivered by

A. T. LAWRENCE J. In this case the prisoner has been convicted of having had carnal knowledge of a girl under the age of sixteen. The evidence given at the trial was ample to support and justify the verdict of the jury, but it is said that certain other evidence, which undoubtedly must have had great weight with the jury, was wrongly admitted, it being evidence which tended to shew that the prisoner had committed another offence, or, at any rate, that he was of bad character. The point arose by reason of evidence having been given by the prosecutrix as to a statement which she said had been made to her by the prisoner shortly after the offence was alleged to have been committed. The statement was as to the prisoner's relations with another girl who had formerly been in his service, and it was of vital importance to the truth of the girl's evidence as to the offence itself that there should be some probability of that particular part of her evidence being true. In fact the value of the evidence would be in proportion to the impossibility of this girl's having been able to invent the statement attributed by her to the prisoner. The prisoner himself gave evidence, and in the course of his cross-examination he was asked the questions, which it is said ought not to have been allowed, with the object of proving that he had made the statement and that it was true that he had had immoral relations with the girl Hearn. Although the latter questions did no doubt tend to prove that he was of bad character, still they also in our opinion tended to shew that he was guilty of the offence with which he was charged, for if he had made that statement to the prosecutrix at the time alleged by her, that fact would strongly corroborate her evidence that the prisoner was the person who had had connection with her. We are therefore of opinion that the learned judge rightly admitted the questions, not in order to prove a habit or system, as was the case in *Makin* v. *Attorney-General for New South Wales* (1) and *Rex* v. *Bond* (2), but because the evidence was material as tending to shew that the statement was one likely to have been made to the

(1) [1894] A. C. 57. (2) [1906] 2 K. B. 389.

1909

REX v. CHITSON.

prosecutrix by the prisoner, and was not invented by her or learnt from some one else, and it was therefore material to the issue as to whether the prisoner did commit the offence for which he was then being tried.

Appeal dismissed.

Solicitors for prisoner: *Tapp, Blackmore & Weston, for G. H. King & Franckeiss, Portsmouth.*

Solicitors for prosecution: *C. P. Fielder, Le Riche & Co., for Biscoe-Smith & Blagg, Portsmouth.*

F. O. R.

1909

July 27, 30.

JUNGHEIM, HOPKINS & CO. *v.* FOUKELMANN.

Arbitration—Arbitrator—Qualification—Arbitrator to be Member of Trade Association—Arbitrator not Member of Association—Estoppel.

A contract, headed "London Corn Trade Association," for the sale by the defendant to the plaintiffs of a quantity of wheat contained a clause that all disputes from time to time arising out of the contract should be referred to two arbitrators, one to be appointed by each party, the two arbitrators having power to appoint a third, and "the arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, and shall also be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association, and residing in the United Kingdom." The clause also provided that either party if dissatisfied with the award might appeal to the committee of appeal elected for the purpose, who were to confirm the award unless four members of the committee decided otherwise. The committee of appeal consisted of five members. A dispute under the contract was referred to arbitration in accordance with the above clause, and the parties attended the arbitration proceedings, and the three arbitrators made an award in favour of the defendant, and the award was confirmed by the committee of appeal. Neither of the arbitrators appointed by the parties was a member of one or other of the three bodies above mentioned, but this fact was not known to the plaintiffs until after the award had been confirmed on appeal. The two arbitrators had, however, on many occasions acted as arbitrators under similar contracts containing a similar arbitration clause. The plaintiffs having brought an action for a declaration that the award was null and void:—

Held that, as the arbitrators were not qualified to act as arbitrators

1909

JUNGHEIM, HOPKINS & CO. v. FOUKELMANN.

under the contract, they had no jurisdiction to determine the dispute, and the award was null and void; and the plaintiffs were not estopped from relying upon the defect in the qualification of the arbitrator appointed by the defendant.

ACTION in the commercial list tried before Pickford J. without a jury.

The action was brought for a declaration that an award made in an arbitration between the plaintiffs, who were merchants carrying on business in London, and the defendant, who was a merchant carrying on business at Odessa, was null and void.

By a contract made in London, which was headed "London Corn Trade Association—Black Sea and Danubian Grain Contract," dated May 8, 1908, the plaintiffs bought of the defendant, on the printed conditions and rules indorsed on the contract, 2000 quarters of South Russian wheat at a certain price including freight and insurance to London. The contract provided that for the purpose of proceedings, either legal or by arbitration, the contract should be deemed to have been made in England and to be performed there, and the Courts of England or arbitrators appointed in England should, except for the purpose of enforcing any award made in pursuance of the arbitration clause thereof, have exclusive jurisdiction over all disputes which might arise under the contract, and such disputes should be settled according to the law of England; and that all disputes from time to time arising out of the contract, including any question of law appearing in the proceedings, should be referred to arbitration according to the rule indorsed on the contract, and neither buyer nor seller, nor any person claiming under either of them, should bring any action against the other of them in respect of any such dispute until it had been settled by arbitration, the obtaining of an award being a condition precedent to the right to sue in respect of any claim arising out of the contract. Clause 10 of the conditions and rules indorsed on the contract was as follows:—

"Arbitration.—All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be appointed by each party in difference, the two arbitrators having power to appoint a third. In the event of one of the parties

1909

JUNGHEIM, HOPKINS & CO. v. FOUKELMANN.

appointing an arbitrator and the other refusing, or for seven days . . . . after notice of the appointment omitting to appoint and instruct his arbitrator, or if any one or more of the arbitrators shall die, refuse to act, or become incapacitated, and the person or persons with whom his or their appointment originally rested shall omit to appoint and instruct a substitute within three days after notice of such death, refusal, or incapacity, or in case the arbitrators or two of them shall not, within twenty-eight days . . . . after the appointment of the last appointed of them, make an award, then upon application of either of the disputing parties . . . . the questions in dispute shall stand referred to two arbitrators to be appointed officially by the executive committee of the London Corn Trade Association at a meeting convened by notice, and at which not less than three members shall be present, such two arbitrators having power to appoint a third. In case the arbitrators appointed as last mentioned shall not within twenty-eight days . . . . after their appointment make an award or appoint a third arbitrator, or in case either of the arbitrators appointed by the parties shall refuse, or for three days after notice from the other of them shall omit, to concur in the appointment of a third arbitrator, then . . . . the said executive committee, at a meeting constituted as hereinbefore provided, shall appoint a third arbitrator, and in the case of the death, refusal to act, or incapacity of any arbitrator appointed by the executive committee, the committee shall from time to time substitute a new arbitrator in the place of the arbitrator so dying, refusing, or becoming incapacitated.

"The arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, and shall also be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association, and residing in the United Kingdom.

"Every award shall be in writing on an official form to be supplied by the association at a charge fixed by them, and the award in writing on an official form of any two arbitrators (subject only to the right of appeal hereinafter mentioned) shall be conclusive and binding upon all disputing parties . . . .

"In case either party shall be dissatisfied with the award, a

right of appeal shall lie to the Committee of Appeal elected for that purpose, and in accordance with the rules and regulations of the London Corn Trade Association in force at date of contract . . . .

"The Committee of Appeal shall confirm the award appealed from . . . . unless four members of the committee decide otherwise. The award of the committee, whether confirming or varying the original award, shall be signed by the chairman of the committee, whose signature as chairman shall be conclusive, and shall in all cases be final.

. . . . .

"Any person having an interest in the matter in dispute shall be incompetent to act as arbitrator, or on the appeal, or to vote on the appointment of arbitrators by the executive committee, or at the election by the Committee of Appeal, but unless objection is taken at the commencement of or prior to the hearing of the reference or of the appeal, as the case may be, no award of arbitrators or of the Committee of Appeal shall be questioned or invalidated upon any of these grounds."

The committee of appeal consisted of five members elected by ballot.

A dispute having arisen under the contract, the matter was referred to arbitration under clause 10, and each party appointed an arbitrator, and the two arbitrators appointed a third arbitrator. Neither of the two arbitrators appointed by the parties, though residing in the United Kingdom, were members either of the London Corn Exchange or of the Baltic or of the London Corn Trade Association. This fact, as the learned judge found, was not known to the plaintiffs until after the award had been made and confirmed by the committee of appeal as hereinafter mentioned. The two arbitrators, however, had had considerable experience in the corn trade and had acted as arbitrators in many arbitrations under London Corn Trade Association contracts similar to the one in the present case. The third arbitrator was a member of the London Corn Trade Association. On December 12, 1908, the three arbitrators made an award in favour of the defendant, directing the plaintiffs to pay a sum of money to the defendant for breach of contract.

1909

JUNGHEIM, HOPKINS & Co. v. FOUKELMANN.

The plaintiffs appealed to the committee of appeal, who on January 7, 1909, confirmed the award. The plaintiffs appeared and took part in the arbitration proceedings both before the arbitrators and before the committee of appeal.

The defendant took out a summons under s. 12 of the Arbitration Act, 1889, to enforce the award, and the plaintiffs, having discovered that neither of the two arbitrators appointed by the parties were members of the London Corn Exchange or of the Baltic or of the London Corn Trade Association, set this up in answer to the application to enforce the award. Upon the plaintiffs undertaking to bring an action claiming a declaration that the award was null and void, the Master adjourned the summons generally. The plaintiffs thereupon brought this action, and an order was made that the action should be transferred to the commercial list, and that the question whether the award was good or not should be tried without pleadings.

J. R. Atkin, K.C., and *Tyfield*, for the plaintiffs. The arbitrators appointed by the parties, not being members of the London Corn Exchange or of the Baltic or of the London Corn Trade Association, were not qualified to act, and had no jurisdiction to make the award. The award is therefore null and void. The authority of an arbitrator depends upon the consent of the parties to refer the matter in dispute to him. Here the parties agreed to refer disputes arising out of the contract to three arbitrators who occupied a certain position. There was no agreement to refer disputes to any other persons. The two arbitrators appointed by the parties did not occupy that position, and therefore they had no jurisdiction to decide the matter in dispute. The qualification of the arbitrators was vital to their jurisdiction. If parties agree to refer a dispute to the engineer of a particular body, and they innocently go before a person who has arrogated to himself the position of engineer to that body, the latter has no jurisdiction to make an award. If the plaintiffs had known before the award was made that the arbitrators were not qualified and had nevertheless proceeded with the reference, they would be taken to have waived the absence of qualification and to have consented that the dispute should be determined by the

arbitrators as personæ designatæ. But they did not find this out until after the award had been made and confirmed on appeal. There was therefore no consent to the dispute being referred to these particular arbitrators, and the award is a nullity.

Maurice Hill, for the defendant. The provision in the arbitration clause that the arbitrators shall be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association is directory only and does not go to the root of the jurisdiction of the arbitrators to act. It merely entitles a party to object to the appointment of a person who is not a member of one or other of those bodies. The plaintiffs not having objected to the arbitrators when they were appointed, the submission to the arbitrators was valid. Further, whatever the qualifications of the arbitrators were, the plaintiffs, by appointing their arbitrator and accepting the appointment by the defendant of the other arbitrator, must be deemed to have agreed to submit the dispute to those two named arbitrators and the third arbitrator appointed by them, even though the submission may have been made under a mistake of fact. The plaintiffs must be taken to have known that arbitrators who are not members of one of the above-mentioned bodies frequently act as arbitrators under these London Corn Trade Association contracts, and they made no inquiry as to whether these arbitrators were members of those bodies or not. There was therefore a parol submission outside the contract to these two named arbitrators and a third one, and the award was well made under that submission. Next, the plaintiffs, having appeared before the arbitrators and having appealed from their award to the committee of appeal, are estopped from taking the objection that the arbitrators were not duly qualified: *Tyerman* v. *Smith* (1); *Andrewes* v. *Elliott*. (2) Knowledge of the defect in the qualification is not necessarily a material element in order to raise an estoppel. Waiver necessarily involves knowledge of the facts, but estoppel does not. If the plaintiffs knew of the disqualification, they must be taken to have waived the defect. But apart from waiver they are estopped. It is clear that they are estopped from setting up the defect in

(1) (1856) 6 E. & B. 719. (2) (1856) 6 E. & B. 338.

1909

JUNGHEIM, HOPKINS & CO. v. FOUKELMANN.

the arbitrator whom they themselves appointed; and by proceeding before the three arbitrators they represented that the arbitrators were properly qualified, and thereby induced the defendant to believe that the submission to those three arbitrators was a good submission, and the defendant incurred expense in consequence and thus altered his position. The plaintiffs are therefore estopped from alleging that the award is bad upon that ground.

J. R. Atkin, K.C., in reply. It is a question of intention whether the parties agreed to refer the dispute to the named arbitrators under a new parol submission independently of the submission in the contract, or whether they intended to refer the dispute under the submission in the contract. Not only is there no evidence that the parties intended to act under a new parol submission, but the facts shew that they intended to act under the submission in the contract. The plaintiffs by appealing to the committee of appeal shewed that they intended to act under the submission in the contract, and the defendant by taking out a summons to enforce the award under s. 12 of the Arbitration Act, 1889, shewed that in his view the arbitration was under the submission in the contract and not under a parol submission, because by s. 27 a submission within the Act is defined as meaning a written agreement to submit, and an award under a parol submission cannot be enforced under the Act. As to the contention that the plaintiffs are estopped from setting up the disqualification of the two arbitrators, they never represented to the defendant that the arbitrator appointed by him was qualified to act, or that they would not take any objection to his want of qualification, because they did not know of it.

Cur. adv. vult.

July 30. PICKFORD J. This is an action claiming a declaration that a certain award is null and void. The question arises out of a contract between the plaintiffs and the defendant which was made in the form adopted by the London Corn Trade Association. The contract was for the sale by the defendant to the plaintiffs of a quantity of wheat, and it provided that the

contract should be subject to an arbitration clause, the nature of which appears from clause 10 of the conditions indorsed on the contract. That clause, so far as material, provides as follows: "All disputes arising out of this contract shall be from time to time referred to two arbitrators, one to be appointed by each party in difference, the two arbitrators having power to appoint a third." The clause then goes on to provide for various contingencies, as, for instance, one of the parties refusing or failing to appoint an arbitrator, or an arbitrator dying or refusing to act, or the two arbitrators not making an award within the specified time or not appointing a third arbitrator, none of which happened in the present case. The clause then proceeds: "The arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, and shall also be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association, and residing in the United Kingdom." What happened in the present case was this. With that specific direction before them, each of the parties appointed an arbitrator who was not a member either of the London Corn Exchange, or of the Baltic, or of the London Corn Trade Association. Having heard a member of the plaintiff firm give evidence, I am satisfied that the plaintiffs did not know, until after the award had been made and confirmed by the committee of appeal, that the two arbitrators were not members of any one of the three bodies above mentioned. The plaintiffs ought certainly to have asked the arbitrator appointed by them whether he was a member, and they would have been wise to have made a similar inquiry from the arbitrator appointed by the defendant. However, they made no such inquiry, and I find that in fact they did not know that the two arbitrators were not members of any one of those bodies. The defendant did not give evidence before me as to whether he knew that or not. He may or may not have known, and considering the frequent practice under these London Corn Trade Association contracts of disregarding the rules in this respect and of appointing an arbitrator who is not a member of one of those bodies, but in whom the party has confidence, it may be that he knew. But that is not material.

1909

JUNGHEIM, HOPKINS & Co. v. FOUKELMANN.

Pickford J.

The two arbitrators appointed a third arbitrator, and they made an award in favour of the defendant. The plaintiffs then appealed to the committee of appeal, and the award was confirmed. The plaintiffs appeared before the arbitrators and took part in the arbitration, and they also appeared before the committee of appeal and called witnesses. The question is whether the two arbitrators, not being qualified under the contract, were in a position to make an award at all.

It is first contended that the conditions indorsed on the contract do not require as a qualification for the arbitrators acting that they shall be members of one of the three specified bodies, but that it is merely a direction that the arbitrators to be appointed shall be members; that either party might have objected to the appointment of an arbitrator who was not a member; but that, as the plaintiffs did not object, the proceedings are valid and the award is good. I do not think so. The qualification seems to me to be a condition of the arbitrators' appointment and of their jurisdiction to act, and it is the same as if the parties had expressly agreed to nominate two members of one of the specified bodies to settle the dispute. It seems to me to go to the root of their jurisdiction to arbitrate. It is then said that what happened amounted to a reference to the two arbitrators nominatim, who were to appoint a third arbitrator, and that therefore there was a valid submission to the three appointed arbitrators, although two of them were not members of any of the above-mentioned bodies. That is a question of the intention of the parties, and in my opinion the parties here intended to appoint the arbitrators, or at least the plaintiffs intended that the arbitrators should be appointed, under the submission contained in the contract, and did not intend to make a new submission outside the contract altogether. The point, however, which was most strongly insisted upon was that the plaintiffs, having attended before the arbitrators, cannot now object to their competence and are in some way estopped from disputing their qualification. No authority has been cited to me which throws any light upon this point, and I myself have been unable to find any. It is not contended that there can be any waiver when there is no knowledge of the facts.

All the cases of waiver proceed upon the principle that if a person knows of a defect in the arbitrator's qualification or in the proceedings, and nevertheless goes on with the reference before him, he cannot afterwards object, as he must be taken to have waived the defect. Inasmuch as the plaintiffs had no knowledge of the want of qualification of the arbitrators there has been no waiver here. With regard to estoppel, it is said that by going on with the arbitration the plaintiffs represented that the qualification of the arbitrators was in order, and that their appointment was valid and the proceedings regular, and that they thereby induced the defendant to go on with the arbitration and to incur expense. I think that, so far as their own appointed arbitrator is concerned, that may well be so. If they choose, without proper inquiry, to appoint a person as arbitrator who has not the proper qualification, thereby putting him forward as properly qualified, and attend the proceedings before him, and thus induce the other party to go on, most probably they cannot afterwards be heard to say that the arbitration is invalid as being before an unqualified arbitrator. But I do not see how that reasoning can apply to the qualification of the arbitrator appointed by the other party. The plaintiffs never represented that the arbitrator appointed by the defendant was properly qualified. They thought that he was qualified, but they made no representation to that effect to the defendant, nor did they make any representation that they would not take objection to the arbitrator's want of qualification of which they were ignorant. Therefore I do not think that the plaintiffs, by proceeding with the arbitration, are precluded from shewing that the arbitrator appointed by the defendant was not a proper person to arbitrate in this dispute. In my opinion the qualification of the arbitrators was a necessary condition of their acting in the arbitration, and I cannot see that the plaintiffs are in any way estopped from now setting it up. I wish to add that I do not think that the fact that the plaintiffs appealed to and appeared before the committee of appeal can make the award good when it was originally bad, or can alter the plaintiffs' legal rights in any way.

The result is that the award is invalid as not having been

1909

JUNGHEIM, HOPKINS & CO. v. FOUKELMANN.

made by the proper persons, and accordingly I make a declaration that the award is null and void.

Judgment accordingly.

Solicitors for plaintiffs: *Judge & Priestley.*

Solicitors for defendant: *Thomas Cooper & Co.*

W. F. B.

1909

April 27, 28; *May* 4.

MANGENA *v.* WRIGHT.

Defamation—Libel—Parliamentary Paper—Printing Extract from—Privilege—Communication by Public Servant—Matter of Public Interest—Duty to communicate—Communication published in Newspaper—Fair Comment—Comment on Allegation contained in privileged Document—Evidence in Mitigation of Damages—Rules of Supreme Court, 1883, *Ord. xxxvi., r.* 37—*Parliamentary Papers Act*, 1840 (3 & 4 *Vict. c.* 9), *s.* 3.

A person who bona fide and without malice prints and publishes an extract from or an abstract of a parliamentary paper, though in doing so he does not act by or under the authority of either House of Parliament, is protected by s. 3 of the Parliamentary Papers Act, 1840, in an action for libel in respect of such publication.

Mangena v. *Edward Lloyd, Ld.*, (1908) 98 L. T. 640, followed.

Where an allegation is made against a person in a privileged document, as, for instance, in a parliamentary paper, a comment upon that allegation by a person who is not the person making the allegation may be fair comment, even though the allegation be untrue.

A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public.

Order XXXVI., r. 37, of the Rules of the Supreme Court, 1883, has not altered the common law as laid down in *Scott* v. *Sampson*, (1882) 8 Q. B. D. 491, with reference to the admissibility of evidence of the plaintiff's bad character in mitigation of damages in an action of libel.

POINTS of law raised upon the pleadings.

The statement of claim alleged in paragraph 1 that the plaintiff was a native of Natal, and at the time of the publication of

the defamatory matters complained of he was a student-at-law of Lincoln's Inn; and in paragraph 2 that on September 5, 1906, the defendant, who was the printer and publisher of *The Times* newspaper, falsely and maliciously printed and published of and concerning the plaintiff in *The Times* the words following:—

"Natal Rebels.

"To the Editor of *The Times*.

"Sir,—I have noticed a paragraph in some of to-day's papers under the heading 'Natal Rebels—Native Petition to the King,' which states that 'a petition has been forwarded to His Majesty in Council on behalf of Mr. Alfred Mangena,'" (the plaintiff) "'a Natal native resident in London.' If I am not mistaken, the Mr. Alfred Mangena referred to is the same native who forms the subject of a report by the Rev. E. Ndolomba which is to be found on page 96 of an official blue book (Cd. 3027) respecting native disturbances in Natal, presented to both Houses of Parliament by command of His Majesty in July last. The statement that Mr. Mangena is a Natal native is not in accordance with fact. He is a Fingo, whose home is in East Griqualand, and his interesting career is detailed in the enclosed extract, for which I trust you will find room in your columns. I think it is only right that this information should be in the possession of the individuals, whoever they are, who are making use of this unfortunate native in their ill-advised agitation against the Natal Government.

"I am, Sir, your obedient servant,

"William Arbuckle,

"Agent-General for Natal.

"Natal Government Agency,
26, Victoria Street, Westminster,
September 4.

"Report by the Rev. E. Ndolomba, re Mr. Alfred Mangena.

"I knew Mr. Mangena during my stay at Cape Town. He used to live with the Rev. Mr. Davis, of St. Barnabas Church, Kloof Road, Cape Town. His home is at Qokoweni, now called Wesleyville, in the district of Clarkbury, East Griqualand. He is a

1909

MANGENA v. WRIGHT.

Fingo. At the outbreak of the bubonic plague in Cape Town the Government, in its wisdom, decided to remove the natives from the municipality of Cape Town as a precautionary measure, which the enlightened natives endorsed, the policy which Mangena tried his utmost to oppose. When the location was established by the Government, the same Government expended large sums of money, of course under the Health Act of the Colony, it was required that the natives should pay a small rent. Then Mr. Mangena came to the fore again and opposed this rent, and created a great disturbance, always coming out to the location from Cape Town with two Englishmen to address the natives. The enlightened natives paid the rent willingly, but the heathen portion and some foolish young men followed Mangena, and refused to pay. These were told to collect 150*l.* so that the case should come before the Supreme Court of the Colony. This money was given, as I heard, and the natives were told that the case was to come on. And now to crown his efforts, the natives were told to take the law into their hands. About August, 1901, on a certain day, the natives took the law into their hands and closed the gates of the location, and prevented any one going to his work, so that no native went to work that day. It was a great day and great disturbances. All the heathens armed with sticks and everything they could get. Twelve of the ringleaders were arrested and tried before the Supreme Court and sentenced to pay 100*l.* or six months' imprisonment with hard labour. Mr. Mangena absconded; his whereabouts were not known for a time. At last we heard that he was in England. This cowardly act greatly exasperated his followers. How he got the money to go to England is a mystery, as he was very lazy to work. But these facts remain: (1.) That his followers never got back their money, 150*l.* (2.) The case was never before the Supreme Court. (3.) Mangena went to England to study. His followers, who were very foolish, are threatening to revenge the day he returns to South Africa. Our magistrate at the time at the location was Mr. Wright.

"E. Ndolomba."

The plaintiff claimed damages.

The statement of defence, so far as material, was as follows:—

"2. As to paragraph 2 of the statement of claim the defendant says as follows:—

"3. In the month of July, 1906, a parliamentary blue book containing certain matters relating to the native disturbances in Natal, to the execution of certain natives in Natal, and to the plaintiff, was laid on the table of the Houses of Parliament and made public.

"4. As to portion of the words complained of, namely, from and including the words 'Report by the Rev. E. Ndolomba' down to the end thereof, the said words are an extract from, or abstract of, a parliamentary paper, report, or proceedings, namely, the blue book in the preceding paragraph hereof referred to, within the meaning of the Parliamentary Papers Act, 1840 (3 & 4 Vict. c. 9), and were published by the defendant bona fide and without malice.

"5. As to the whole of the residue of the said words the defendant denies that the said words are defamatory of the plaintiff, or that they bear, or are capable of bearing, any meaning defamatory of the plaintiff.

"6. In the alternative, as to the words in paragraph 5 hereof referred to, except the words 'Natal Rebels. To the Editor of *The Times*,' the defendant says that the said words were published under such circumstances and on such occasion as to render them privileged.

"Particulars.

"Early in 1906 there was unrest and disturbance among the natives in Natal, and a police officer was killed. Martial law was proclaimed in the district, and twelve natives were tried by court-martial on a charge of having murdered the police officer, found guilty, and sentenced to death.

"The plaintiff made applications to the authorities in Natal and petitioned the King in Council in respect of the sentence. The Privy Council dismissed the petition, and the natives were executed. The plaintiff also applied at Bow Street police court for a warrant against the Governor of Natal for feloniously killing the twelve natives who were executed. The Natal Legislature passed an Act of Indemnity, and the plaintiff, on behalf of himself and a native chief, Tilonko, who had been sentenced by

1909

MANGENA v. WRIGHT.

a court-martial to ten years' imprisonment, petitioned the King in Council to disallow the Act. The Privy Council refused to interfere.

"It was after and in consequence of these matters that Sir William Arbuckle, the Agent-General for Natal in this country, in discharge of his public duty towards the people and the Legislature of Natal, and in their interest, and in the interest of the people of this country, wrote the said words and sent them in the form of a letter to the defendant for publication, and it was under a sense of duty, in the interests of the people and the Legislature of Natal, and of the people in this country, without malice, and in the honest belief that the statements were true, that the defendant published the said words.

"7. In the further alternative as to the words in paragraph 5 hereof referred to the defendant says that the said words are fair comment, made bona fide and without malice, upon the matters contained in the parliamentary blue book referred to in paragraph 3 hereof, and upon the report contained in the said blue book, which is set out in the statement of claim, which are matters of public interest."

The reply was as follows:—

"1. The plaintiff will object that the statement of defence discloses no defence to the libel complained of, and that in law it is no answer to the plaintiff's complaint to say that a portion of the words complained of, if separated from the residue of the publication, is not defamatory, or to say that one portion of the said words is fair comment on the facts alleged in the residue of the same publication, or to say that, if the words complained of from and including the words 'Report by the Rev. E. Ndolomba' down to the end thereof are separated from the residue of the said publication, the said words are an extract from or an abstract of a parliamentary paper as alleged in paragraph 4 of the statement of defence, or to say that the words complained of are privileged pro tanto as alleged in paragraph 6 of the statement of defence.

"2. The plaintiff denies that the words referred to in paragraph 5 of the statement of defence are fair comment made by the defendant upon the matters and things in paragraph 7 of the statement of defence alleged or any of them.

"3. The parliamentary paper referred to in paragraph 3 of the statement of defence was not published by any person employed by or acting by or under any order or authority of either House of Parliament.

"4. The plaintiff denies the several matters and things alleged in the particulars to paragraph 6 of the statement of defence to be true or relevant to either the circumstances or the occasion of the publication complained of in this action.

"5. If it be proved or held that the matters and things alleged in the said particulars are material $\frac{\text{and}}{\text{or}}$ relevant to any issue in this action, the plaintiff admits:—

"(A) That on February 9, 1906, martial law was proclaimed by the Governor of Natal over the whole of that Colony, and that in the month of March, 1906, twelve natives were tried by court-martial for the act which led to the issue of the said proclamation of martial law, that is to say, for an act committed against the ordinary law before the date of the said proclamation, and that the said natives were found guilty and sentenced to death.

"(B) That the plaintiff on March 31, 1906, petitioned the King in Council in the name and on behalf of the said condemned natives for special leave to appeal from their said convictions and sentences," so as to raise the question of the legality of the trial and conviction by martial law; that the hearing was appointed for April 2, whereof notice was given to the Governor of Natal by cable and to the Agent-General for Natal by letter, and notwithstanding the notices the prisoners were shot in Natal at the time when the Judicial Committee of the Privy Council were assembling to hear and determine the application; that the petition was dismissed; and that the defendant reported in *The Times* the proceedings in the Privy Council, and also published in the same newspaper on the same day a leading article commenting upon the proceedings.

"(C) That in May, 1906, the plaintiff applied to the magistrate at Bow Street to take his informations under the provisions of the Colonial Governors Acts, 11 & 12 Will. 3, c. 12, and 42 Geo. 3, c. 85, charging the Governor of Natal with divers acts of oppression in illegally executing the twelve natives in the last preceding sub-paragraphs mentioned, but the magistrate

1909

MANGENA v. WRIGHT.

declined to allow the plaintiff to subscribe the said information upon the ground that the Governor of Natal was absent from England and beyond the seas.

"(D) That on September 3, 1906, the plaintiff as alleged presented a petition to the King in Council praying an inquiry into the said alleged oppressions, and a reference of the said petition to the Judicial Committee . . . . and that His Majesty . . . . would disallow the Act of Indemnity referred to in the defendant's said particulars. The libel complained of in this action was published by the defendant on September 5, 1906, some three months before the said petition came under the consideration of His Majesty the King for decision.

"6. Save as herein is contingently admitted the plaintiff joins issue on the allegations of fact alleged in the statement of defence."

In a further reply the plaintiff said that "the defendant ought not to be admitted to say that the words referred to in paragraph 7 of the statement of defence are fair comment made bona fide and without malice upon the matters contained in the parliamentary blue book referred to in paragraph 3 of the statement of defence $\frac{\text{and}}{\text{or}}$ upon an alleged report of the Reverend E. Ndolomba contained in the said blue book, or that the said words were published under the circumstances and on the occasion referred to in paragraph 6 of the statement of defence, because before the commencement of this action the plaintiff brought an action against the now defendant in this Honourable Court (1906, M., No. 2122) claiming damages for a libel published in *The Times* newspaper on the 26th of July, 1906, whereby the defendant imputed to the plaintiff in substance, inter alia, the same matters and things as are alleged against the plaintiff in the publication complained of in this action, and the defendant pleaded in his defence in the said action that the words published, in so far as they consisted of statements of fact, were in their natural and ordinary signification true in substance and in fact, and the plaintiff joined issue on the said defence, and such proceedings were thereupon had that the issue so joined came on to be tried on the 12th day of May, 1908, before the Lord Chief Justice of England and a special jury at the Royal Courts

of Justice in London, and upon the said trial judgment was entered on the defendant's admissions and with the defendant's consent in the said former action for the plaintiff, and the said judgment still remains in full force; and the facts alleged as true in the said former action and the alleged facts of public interest which the defendant now says are truly stated in the parliamentary blue book referred to in paragraph 3 of the statement of defence $\frac{\text{and}}{\text{or}}$ in the alleged report of the said Ndolomba contained in the said blue book and warranted the imputations conveyed by the publication complained of in this action, being the defendant's alleged comment, are the same."

It appeared that in the former action by the present plaintiff against the present defendant (1906, M., No. 2122), referred to in the further reply, an order had been obtained on behalf of the defendant on June 10, 1907, for the examination of witnesses in South Africa, and that with the view of saving expense and with the consent of all parties it was ordered that the parties to three other actions of libel brought by the same plaintiff against Edward Lloyd, Limited (the proprietors of the *Daily Chronicle*), the *African World*, and Sir William Arbuckle respectively in respect of a similar publication should be at liberty to attend the examination and to call and cross-examine witnesses, and that the depositions taken might be used and read in all or any of the actions so far as the same were relevant thereto. Under this order witnesses were examined and cross-examined in South Africa. An order having been obtained in the present action from the Master enabling the evidence taken on commission in South Africa in the above action to be read as evidence in this action, subject to any proper ground of exception, Phillimore J. on February 9, 1909, varied the order by directing that the question of law as to the admissibility of the evidence should be tried as a preliminary point of law, the form of question to be subsequently settled; and on February 21 the learned judge settled the form of the question, which, so far as material, was as follows: "Whether the evidence taken in South Africa in the action *Mangena* v. *Wright* (1906, M., No. 2122) is relevant to any issue which in the opinion of the Court may be to be determined on the pleadings or notice (if any has been

1909

MANGENA v. WRIGHT.

given) under Order xxxvi., r. 37, in the (present) action *Mangena* v. *Wright* (1908, M., No. 2763) . . . . Defendant to be at liberty, upon giving notice not less than ten days before the hearing of this case, to limit the parts of the evidence which he seeks to render admissible."

Upon March 2, 1909, an order was made by Phillimore J. that the points of law raised by the plaintiff's reply and by the further reply be treated as an addition to the question of law directed to be set down and tried under the above order.

Jellicoe, for the plaintiff. The defendant seeks to sever the inclosure from Sir William Arbuckle's letter, and he pleads privilege and fair comment as to the letter, and privilege as to the inclosure. The alleged libel, however, is not divisible: *Eaton* v. *Johns* (1); *Walker* v. *Brogden*. (2) To separate the inclosure from the letter would make the letter meaningless. The inclosure must be read into the letter.

[PHILLIMORE J. It is a question of the construction of each particular libel.]

Assuming that the alleged libel can be severed, the part which is alleged to be fair comment, namely, the letter as distinct from the inclosure, is not comment. The words "his interesting career is detailed in the enclosed extract" incorporate the statements of fact in the inclosure, and those statements are admittedly untrue. The alleged comment, therefore, is not comment, but a misstatement of fact. Again, if the words are capable of being construed as comment, the facts upon which the comment is made must be truly stated, and the comment must be upon a matter of public interest: *Hunt* v. *Star Newspaper Co.* (3) Here the comment is made upon the facts stated in the inclosure, which are untrue. An assertion that a person has been guilty of particular acts of misconduct, unless the facts warrant the imputation, cannot be fair comment: *Campbell* v. *Spottiswoode* (4); *Davis* v. *Shepstone* (5); *Joynt* v. *Cycle Trade Publishing Co.* (6); *Odger* v. *Mortimer*. (7) A person who comments on the statements

(1) (1842) 1 Dowl. (N.S.) 602.
(2) (1865) 19 C. B. (N.S.) 65.
(3) [1908] 2 K. B. 309.
(4) (1863) 3 B. & S. 769.
(5) (1886) 11 App. Cas. 187.
(6) [1904] 2 K. B. 292.
(7) (1873) 28 L. T. 472.

in a document written by another person, as, for instance, in a parliamentary paper, those statements being untrue, is liable, even though the document is privileged. Such a person stands in no better position than the person who repeats a rumour which he has heard about another and who is liable: *Watkin* v. *Hall.* (1) The defendant is estopped from setting up the truth of the allegations against the plaintiff. In the previous action between the same parties, where the same matters were charged against the plaintiff as are charged in this action, the defendant, by withdrawing his plea of justification and consenting to judgment for the plaintiff, admitted that the facts stated against the plaintiff were untrue, and he cannot now be heard to say that the same facts are true: *Macdougall* v. *Knight.* (2) Fair comment must be comment upon facts which are truly stated, and as the defendant is estopped from alleging that the facts upon which the comment is made are true, the comment cannot be fair. Moreover, the plaintiff's character was not a matter of public interest, and therefore the plea of fair comment must fail on that ground.

Next, s. 3 of the Parliamentary Papers Act, 1840 (3), does not

(1) (1868) L. R. 3 Q. B. 396.

(2) (1890) 25 Q. B. D. 1.

(3) 3 & 4 Vict. c. 9 ("An Act to give summary protection to persons employed in the publication of parliamentary papers"):

"Whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published; and whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned; be it enacted . . . . that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes, or proceedings by such person or persons, or by his, her, or

1909

MANGENA v. WRIGHT.

protect the defendant in respect of the publication of Ndolomba's report. The title of the Act and the preamble shew that the protection is only intended to extend to the publication of a parliamentary paper by a person who is employed by or acting under the authority of either House of Parliament. Sect. 1 protects the publisher in such circumstances, s. 2 protects the publisher of a copy of a parliamentary paper, and s. 3 protects the "printing" of an extract from or abstract of a parliamentary paper. The true reading of s. 3 is that it only protects the printing of a parliamentary paper for the purpose of the publication referred to in the earlier sections; that is to say, the section only protects the printer who acts under the authority of one of the Houses of Parliament, and it is not intended to protect a printing of an extract or abstract by any other person. If it were intended to give a wider protection, the Act would have protected an oral as well as a printed publication. A member of Parliament may be convicted of libel for maliciously publishing in a newspaper the report of a speech delivered by him in

---

their servant or servants, by or under the authority of either House of Parliament, to bring before the Court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior Courts at Westminster) . . . . a certificate . . . . stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such Court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act."

Sect. 2 provides for the stay of proceedings in respect of the publication of a copy of such report, paper, votes, or proceedings.

Sect. 3: "It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or abstract of such report, paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to shew that such extract or abstract was published bona fide and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants."

1909

MANGENA v. WRIGHT.

Parliament, if it contains libellous matter: *Rex* v. *Creevey*. (1) The case of *Houghton* v. *Plimsoll* (2) is distinguishable upon the ground that the statement alleged to be libellous in that case was the defendant's comment upon the evidence given before a Royal Commission and published in a report which was presented to Parliament by command of the Queen. The question which was left to the jury by Amphlett B. in that case was really, so far as can be seen from the report, a question of fair comment. If, however, that case decided that an extract made by any person from a parliamentary paper comes within the protection of the Act, the decision is wrong, and, being the decision of a judge at nisi prius, this Court is not bound by it. Darling J. in *Mangena* v. *Edward Lloyd, Ld.* (3), when sitting at nisi prius, merely followed that decision without expressing his own opinion upon the point, and that case, therefore, cannot be cited as an independent authority upon the point; and when that case was in the Court of Appeal (4) it was decided upon the facts, and the Court expressed no opinion upon the point of law decided by Darling J. [He also referred to *Baldwin* v. *Elphinston*. (5)]

Apart from the Parliamentary Papers Act, 1840, the occasion upon which the defendant published the alleged libel was not privileged. The publication of an extract from a public document which is open to the public, but which does not relate to a judicial proceeding, is not privileged: per Wright J. in *Reis* v. *Perry* (6); Odgers on Libel, 4th ed., p. 296. Nor is any occasion alleged in the pleadings which imposed upon the defendant the duty of publishing the letter of Sir William Arbuckle. There was clearly no duty on the part of *The Times* to publish the letter. The only head of privilege which the case can possibly be said to come within is that of common interest. There is, however, no common interest between the publisher of a newspaper and the public. The readers of *The Times* have no corresponding interest in the subject-matter of the communication. Two things must co-exist to make the occasion privileged: he

(1) (1813) 1 M. & S. 273.
(2) *The Times*, April 2, 1874.
(3) 98 L. T. 640.
(4) (1908) 25 Times L. R. 26.
(5) (1775) 2 W. Bl. 1037.
(6) (1895) 64 L. J. (Q.B.) 566.

1909

MANGENA v. WRIGHT.

who makes the communication must have an interest in making it, and those to whom it is made must have a corresponding interest in having it made to them: *Hunt* v. *Great Northern Ry. Co.* (1) Moreover, even if the occasion was privileged, the comment destroyed the immunity: *Lewis* v. *Levy.* (2) [*Capital and Counties Bank* v. *Henty* (3) and *Ponsford* v. *Financial Times, Ld.* (4) were also referred to.]

The last question is that of the admissibility of the evidence taken on commission in the former action. Order xxxvii., r. 3, does not make the evidence taken in another action admissible unless it is by law admissible: *Printing Telegraph and Construction Company of the Agence Havas* v. *Drucker.* (5) To make the evidence admissible the parties must be the same and the issues the same. The issues in the present action are not the same as in the former action. Nor is the evidence admissible under Order xxxvi., r. 37, which allows evidence to be given as to the character of the plaintiff in mitigation of damages in actions for libel or slander. Evidence of general bad reputation can be given in mitigation of damages, but not evidence of particular facts tending to shew the character of the plaintiff: *Scott* v. *Sampson* (6); *Bracegirdle* v. *Bailey.* (7) The rule has not altered the law. None of the evidence sought to be given here relates to general bad character, and therefore it is not admissible. [*Hennessy* v. *Wright* (8) was also referred to.]

J. E. Bankes, K.C., and *Eustace Hills*, for the defendant. First, with regard to the estoppel point. In the former action between the same parties the comment complained of was that the petition of the plaintiff to the King in Council was a spurious document, and that he had misappropriated the 150*l.* mentioned in the Reverend E. Ndolomba's report. The defendant pleaded justification and fair comment, and at the trial he consented to judgment for the plaintiff. That estops the defendant from afterwards alleging that the charges he made against the plaintiff are true and that the comment is fair. But the

(1) [1891] 2 Q. B. 189.
(2) (1858) E. B. & E. 537.
(3) (1882) 7 App. Cas. 741.
(4) (1900) 16 Times L. R. 248.
(5) [1894] 2 Q. B. 801.
(6) (1882) 8 Q. B. D. 491.
(7) (1859) 1 F. & F. 536.
(8) (1888) 24 Q. B. D. 445, n.

defendant can use the facts to support a different comment. He is not estopped from shewing that the extract from the blue book is privileged and that the comment on it contained in Sir William Arbuckle's letter is fair. The defendant does not now say that the petition to the King was a sham petition or that the plaintiff misappropriated money. The comment here is that the plaintiff is a mischievous agitator. The extract from the blue book is privileged under s. 3 of the Parliamentary Papers Act, 1840: *Houghton* v. *Plimsoll* (1); *Mangena* v. *Edward Lloyd, Ld.* (2) The extract being privileged, any one may comment upon a privileged document, provided that the comment is fair. It is for the jury at the trial to say whether Sir William Arbuckle's letter commenting upon the extract is fair comment; and a statement of a fact may in certain circumstances be fair comment, if it is an inference of fact reasonably drawn from other facts: *Hunt* v. *Star Newspaper Co.* (3) It is for the jury to say whether the comment is fair. The words in the letter, "his interesting career is detailed in the enclosed extract," may well be construed by the jury as comment upon the extract, and not as the adoption of the statements of fact in the extract as true. The Court cannot say as a matter of law that the letter cannot reasonably be said to be fair comment.

Next, with regard to the question of privilege apart from the Parliamentary Papers Act, 1840, an official in the position of the Agent-General for Natal was under a duty to the public, in the interests both of Great Britain and of Natal, to give information as to the conduct and character of a person who was endeavouring to intervene in England between the Imperial and the Colonial Governments: *Allbutt* v. *General Council of Medical Education and Registration* (4); and it being his duty to publish that information, it was the duty of *The Times* to publish it, as that was the proper means of communicating the information to the public. Further, the communication was made by a person having a common interest with those to whom the communication was made. In either case the occasion was

(1) *The Times*, April 2, 1874.
(2) 98 L. T. 640.
(3) [1908] 2 K. B. 309, at p. 321.
(4) (1889) 23 Q. B. D. 400, at p. 412.

1909

MANGENA v. WRIGHT.

privileged: *Stuart* v. *Bell.* (1) Where the public as a whole are interested in the subject-matter of the communication, it is the duty of the proper official to make the communication to the public, and to do so by publishing it in a newspaper. There is no authority directly in point, but upon principle this contention is sound. The facts in the present case have not yet been ascertained, and it is therefore impossible at this stage of the proceedings to say that this ground of privilege does not apply.

The remaining question is whether the evidence taken on commission in the former action is admissible. The defendant only seeks to use the evidence for the purpose of shewing that the plaintiff was a mischievous agitator, and one who would present a petition to the King without any adequate justification. It is relevant for that purpose. It is also relevant in mitigation of damages. At common law general evidence of the plaintiff's bad reputation could be given in mitigation of damages: *Scott* v. *Sampson* (2); and Order xxxvi., r. 37, obliges the defendant before he can give such evidence to furnish the plaintiff with particulars of the matters as to which he intends to give evidence: see *Wood* v. *Earl of Durham* (3); *Scaife* v. *Kemp & Co.* (4) An infamous act may constitute a man of bad character in the district in which he lives. The fact that the defendants in similar actions by the same plaintiff were at liberty to attend the examination and to call and examine witnesses does not affect the question. Part of the evidence, therefore, is or may be relevant, and whether it ought to be admitted must be for the judge at the trial to decide. It is not for the Court now to decide whether it is admissible or not.

Jellicoe, in reply. Assuming that the Court will hold, upon the authority of *Mangena* v. *Edward Lloyd, Ld.* (5), that the publication of the extract from the blue book is protected by s. 3 of the Parliamentary Papers Act, 1840, Sir William Arbuckle's letter is not capable of being construed as fair comment on the extract, because some of the statements in the extract are untrue. Nor was the occasion of the publication privileged, because there

(1) [1891] 2 Q. B. 341.
(2) 8 Q. B. D. 491
(3) (1888) 21 Q. B. D. 501.
(4) [1892] 2 Q. B. 319.
(5) 98 L. T. 640.

can be no question of any duty to communicate that which is not true, nor any common interest in the subject-matter of such a communication.

Cur. adv. vult.

May 4. PHILLIMORE J. read the following judgment:— The plaintiff, who says that he comes from Natal, and who certainly belongs to one of the native races of South Africa, brings his action against the defendant, the publisher of *The Times*, for an alleged defamatory libel consisting of a letter published in that journal on September 5, 1906. The letter purports to be written by Sir William Arbuckle, Agent-General for Natal, and to be addressed from the Natal Government Agency. It refers to a native petition said to have been forwarded to the King in Council by Mr. Alfred Mangena (that is, the plaintiff), and says that he is "the same native who forms the subject of a report" which is to be found in an official blue book, and proceeds to say that "his interesting career is detailed in the enclosed extract, for which I trust you will find room in your columns. I think it is only right that this information should be in the possession of the individuals, whoever they are, who are making use of this unfortunate native in their ill-advised agitation against the Natal Government." The report referred to then follows. It contains several statements concerning the plaintiff which are capable of being construed by a jury as defamatory.

The defendant pleads, first, that the report is an extract from or abstract of a parliamentary paper, report, or proceedings within the meaning of the Parliamentary Papers Act, 1840, and was published bona fide and without malice; secondly, that the letter proper contains nothing defamatory of the plaintiff; thirdly, that the words in the letter proper were published under such circumstances as to render them privileged; fourthly, that these words are fair comment upon the matters contained in the extract from the parliamentary paper.

The plaintiff originally replied that the statement of defence disclosed no defence, that the words were not fair comment, and that the parliamentary paper was not published by any person

1909

MANGENA v. WRIGHT.

Phillimore J.

employed by, or acting by or under any order or authority of, either House of Parliament. He traversed the particulars alleged in the defence of privilege, and what he called "contingently admitted" but in fact averred certain new matter. Afterwards the plaintiff got leave to deliver a further reply pleading an estoppel to the defences of fair comment and privilege. Before this further reply was delivered, the defendant had obtained an order from the Master enabling him to read certain evidence taken upon commission in an earlier action between the same parties. The plaintiff appealed from this order, and the appeal came before me. After some discussion it was considered advisable that a preliminary question as to the admissibility of this evidence should be tried, and ultimately an order settling the question was made by me on February 21 in this year. The order is as follows: "Questions of law ordered to be stated and argued as a preliminary question by Phillimore J., by order dated 9th of February, 1909. (1.) Whether the evidence taken in South Africa in the action *Mangena* v. *Wright* (1906, M., No. 2122) is relevant to any issue which in the opinion of the Court may be to be determined on the pleadings or notice (if any has been given) under Order xxxvi., r. 37, in the action *Mangena* v. *Wright* (1908, M., No. 2763). (2.) Whether evidence (if any) taken under the last paragraph of the order for examination dated the 10th of June, 1907 (which order is to be referred to), is similarly admissible. Defendant to be at liberty, upon giving notice not less than ten days before the hearing of this case, to limit the parts of the evidence which he seeks to render admissible."

On March 2 the plaintiff obtained an order that the points of law raised by his reply and his further reply be treated as an addition to the question of law already fixed to be argued. When the hearing came on, this supplemental question was treated by the plaintiff, and probably rightly, as more important than that originally set down, and he claimed and got the right to begin, and in the result a number of points were submitted for my decision, which had best be taken in the following order.

First, as to the estoppel pleaded in the further reply. The

pleading says that in the previous action the defendant imputed to the plaintiff in substance, inter alia, the same matters as are alleged against him in the publication now complained of, that the defendant then justified, and the case came on for trial, and thereafter judgment was entered against the defendant on his own admission. If the defendant has admitted that certain charges which he made against the plaintiff were both defamatory and untrue, why is he, when sued for another publication of them, precluded from raising the defences of fair comment and privilege? There is no estoppel. If indeed it is a necessary element in the defence of fair comment that the facts commented on should be true, and if some of the charges in the two publications are the same, the defence of fair comment will fail, because the defendant's admission will be incontrovertible evidence against him that the facts are not true. But though in many cases this is a necessary element in the defence of fair comment, it is not, as I shall shew, a necessary element in this case. Moreover, the defendant may plead fair comment, though he will fail in the proof. We are dealing so far with an estoppel in pleading. The plaintiff, in order to obtain the exclusion of the evidence in the former case, asked me to look at the previous publication and the pleadings in the previous action and compare the two libels to see if there were not charges common to both. I have looked, and in the result I cannot determine this question. There is enough doubt to make it matter for the jury.

The next point to be considered is the defence raised by the Parliamentary Papers Act, 1840, and the reply to it, which I was asked by the plaintiff to construe as averring that the particular publication in *The Times* was not under the authority of either House of Parliament. The decisions upon ss. 2 and 3 of the Parliamentary Papers Act have apparently been few. There was a case of *Houghton* v. *Plimsoll* (1), tried before Amphlett B. at Liverpool, in which he appears to have directed the jury that the 3rd section applied to the publication of an extract from a parliamentary paper in an ordinary serial magazine. There are, however, some difficulties in understanding the summing up as reported in respect to this and other points. Then there is

(1) *The Times*, April 2, 1874.

1909

MANGENA v. WRIGHT.

Phillimore J.

the ruling of my brother Darling in the case of *Mangena* v. *Edward Lloyd, Ld.* (1), the same plaintiff and the same extract, that s. 3 does apply. I agree with these rulings. It seems to me that whereas under s. 1 those publishing under the direct authority of either House of Parliament are given the protection of a summary stay of proceedings, like the remedy given in favour of ambassadors under the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), and those not acting under the authority of Parliament but publishing complete copies of parliamentary papers already published are given a somewhat similar remedy, those who publish an abstract or an extract only are placed in the position of having to plead the statute, and to aver and prove that their publication was bona fide and without malice. There is a little difficulty in the use of the word "printing" instead of "publishing" in the first part of the 3rd section, but this is not enough to take away the protection given by the plain words of the section. The preamble probably refers only to the 1st section of the Act, and I should conjecture that the 2nd and 3rd sections were added to the Bill later.

The next defence to consider is that raised by paragraphs 5 and 7 of the defence, that the letter proper is not defamatory and is alternatively fair comment. As to the letter proper not being defamatory I had for a time great doubt. The apparent construction of the words "his interesting career is detailed in the enclosed extract" would make them a repetition and restatement of the extract, and the extract is not denied to be defamatory. But after hearing counsel for the defendant I am of opinion that it would be open to the jury to find that these are words of comment and not of statement, and that the matter, therefore, is one for the jury.

Then comes the question of comment. Is it fair comment? The plaintiff says it cannot be fair comment because it is founded on untrue statements. No doubt when there is one published document in which the writer partly alleges and partly comments, and of which the sum total is defamatory, the document cannot be justified unless the facts are true and the comment fair; because if the facts do not warrant defamatory

(1) 98 L. T. 640.

comment the comment is not fair, and if the facts as alleged warrant defamatory comment they are defamatory and must be proved to be true. But when one person alleges and another comments this reason does not apply. I think this view, if true in other cases, is especially true when the allegation, as distinct from the comment, is made in a privileged document. If by some unfortunate error a vote in Parliament recites, or a judge in giving the reasons of his judgment states, that which is derogatory to some person, and the charge is mistaken and ill-founded, and a newspaper reports such vote or judgment, and proceeds in another part of its issue to comment upon the character of the person affected in terms which would be fair if the charge were well founded, the newspaper which so reports and comments should be entitled to the protection of fair comment. I should observe that the case of *Reis* v. *Perry* (1) has been misunderstood in some text-books. The case only decided that no privilege attaches to an incorrect extract from a public document, even though the extract was officially supplied. The judgment of Wright J. does discuss a further question, but not so broad a one as that sometimes supposed, and by some writers attributed to the whole Court.

Lastly comes the plea of privilege. It is admitted by the defendant that there is no case where the privilege has been put exactly in the way in which he seeks to put it. This publication may be considered as a communication by a person having a social or public duty, the Agent-General for Natal having a duty to communicate, in the interest of the Colony which he represents and of union and harmony between it and the mother country, facts concerning the career of one who comes from Natal or its neighbourhood and is not known in England, and who is interposing in England between the Government of Natal and the Government of the mother country. Or it may be considered as a communication by a person having a common interest to others having the like interest, even though the community of interest is one shared with all the subjects of the King or all those in the mother country. If it is a public matter and one concerning a man taking for the time a public part, I think this

(1) 64 L. J. (Q.B.) 566.

1909

MANGENA v. WRIGHT.

Phillimore J.

may be so. It may come within the language cited by Lopes L.J. when delivering the judgment of the Court in *Allbutt* v. *General Council of Medical Education and Registration* (1): "The publication of a matter of a public nature and of public interest and for public information was privileged, provided it was published with the honest desire to afford the public information and with no sinister motive." I think that, at any rate where the communication is made by a public servant as to a matter within his province, it may be the subject of privilege in him, and if in him, then in *The Times*, because Sir William Arbuckle could only make the communication through some such medium. I think, therefore, that the defendant may go to trial upon this and the other pleas.

Then come the questions which originally led to this hearing, those as to the admissibility and relevancy of previous evidence. I think that the depositions, having been taken between the same parties and upon issues the same or so far similar that the defendant had ample opportunity for cross-examination upon all the points now material, are admissible in evidence in this case. Indeed, this was hardly contested. I think also that there is nothing in the peculiar terms of the order under which the depositions were taken, the defendants in other actions brought by Mangena being allowed to join in the examination, which prevents the present defendant from using any of this evidence which he now seeks to use. If one defendant had examined and then another defendant had cross-examined the same witness, with all the privileges which cross-examination gives, I should not have allowed the cross-examination to be read. But the mere fact that one or two witnesses who gave evidence in favour of the several defendants were examined in chief by the counsel for the other defendants, which may well have been a matter of personal arrangement, does not make their evidence less admissible.

I have also to determine whether any and what part of this evidence will be relevant to the issues in the present case. Some of it may be relevant in support of the plea of fair comment. It will be relevant if and so far as it goes to support the allegations of fact in the first two clauses of the particulars of

(1) 23 Q. B. D. 400, at p. 412.

the plea of privilege. It will also be relevant if and so far as it proves in reduction of damages that the plaintiff's general character as a public man is bad. But it will not be relevant if and so far as it tends to prove other specific charges than those which are in issue in these pleadings. Order xxxvi., r. 37, does not change the common law as laid down in *Scott* v. *Sampson*. (1) The case of *Scaife* v. *Kemp & Co.* (2) is not an authority to the contrary.

Upon the whole there must be judgment for the defendant upon the questions of law raised by the reply and the further reply, and there must be a declaration as to the question of evidence drawn up on the lines already indicated. The costs of the applications and this hearing will have to be apportioned. So far as they relate to the arguments on the reply and further reply the defendant must have them in any event. So far as they relate to the admissibility of evidence they will be costs in the cause.

Order accordingly.

Solicitors for plaintiff: *Metcalfe & Sharpe.*
Solicitors for defendant: *Soames, Edwards & Jones.*

(1) 8 Q. B. D. 491. (2) [1892] 2 Q. B. 319.

W. F. B.

1909
July 17.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* SOLOMONS.

Criminal Law—Falsification of Accounts—Machine—Taximeter—Falsification of Accounts Act, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

By s. 1 of the Falsification of Accounts Act, 1875, it is enacted that if any servant shall wilfully and with intent to defraud falsify any account which belongs to his employer, or has been received by him on behalf of his employer, the person so offending shall be guilty of a misdemeanour:—

Held, that a servant may be convicted under the above enactment who wilfully and with intent to defraud tampers with a mechanical instrument used by his employer for registering figures from which an account is subsequently prepared as between the parties.

A company were the owners of certain motor cabs and had in their service a number of cabdrivers. Each cab was fitted with a taximeter, that is, a mechanical instrument which, when in action, registers upon a dial the amount earned by the driver from persons hiring the cab. The taximeter was put into and out of action by the driver depressing and raising a lever respectively. From the figures appearing on the dial at the end of the day an account was prepared stating the proportions due to the company and to the driver for the use of the cab.

For several successive days a driver in the company's service took certain passengers on a definite round, receiving from them on each day the same fare. While taking the passengers on this round, the driver wilfully and with intent to defraud drove the cab with the lever of the taximeter raised, so that the instrument was put out of action and registered nothing:—

Held, that the driver was properly convicted of falsifying an account within the meaning of the above enactment.

Appeal from a conviction.

The General Motor Cab Company, Limited, were the proprietors of a number of motor cabs, each fitted with a taximeter, that is to say, an instrument which by mechanical means registers upon a dial or face numbers indicating the amount chargeable for the hire of the cab. The taximeter is put into action by depressing a lever to which is attached a piece of metal made to imitate a flying flag and bearing upon it the words "For hire." When this lever is in a vertical position the cab is understood to be for hire; the taximeter is out of action and registers nothing. When the lever is horizontal the taximeter is in action. When a person

hires a cab the driver depresses the lever; the taximeter thereupon while the cab is in motion registers 8*d.* for the first mile and 2*d.* for each succeeding quarter of a mile, and while the cab is at rest registers 2*d.* for every two and a half minutes.

The prisoner was in constant employment as a driver of the cabs of the company. As such driver he was bound to conform to a number of directions posted up in the company's garage. The breach of these directions involved in many cases the suspension or dismissal of the driver.

The course of conduct pursued by drivers of the company's cabs was as follows:

A driver, on returning to the company's garage after a day's work, is met by a clerk in the company's service, called a taximeter reading clerk. This clerk enters upon a slip of paper the date, the number of the returning cab, and the figures appearing on the face of the taximeter. These figures shew the total number of charges at 2*d.*, charges at 8*d.*, and extras respectively earned on that day together with those, if any, earned on previous days. The driver signs this slip with his name and adds his badge number. The slip so filled in is handed by the taximeter reading clerk to the night watchman, who hands it to the night clerk on his arrival.

The night clerk has before him a document called the taximeter sheet, which, with former sheets, constitutes the record of the work done and money earned by the driver of the cab. The taximeter sheet contains a statement of the total amount of work done and money earned up to and including the day before, the amount being entered in a space opposite the word "Yesterday" on the sheet. Above this word and the entries opposite it is the word "To-day," and opposite it a space to be filled in with the day's readings. Into this space the night clerk copies the figures appearing on the slip; he then subtracts the figures opposite "Yesterday" from the figures opposite "To-day" and enters upon the sheet the difference as the result of the day's work. Of the takings so computed he enters three-fourths as due to the company and one-fourth to the driver.

When the night clerk has completed these entries on the

1909

REX v. SOLOMONS.

taximeter sheet he sends the sheet to the cashier's office with the reading slip attached to it. From these materials the cashier begins to prepare the taximeter sheet for the coming day by copying into the space opposite the word "Yesterday" in the new sheet the figures opposite the word "To-day" in the old sheet.

When the driver returns for the new day's work he presents himself at the cashier's office, pays the amount entered as due from him on the old taximeter sheet, and signs a certificate at the foot thereof in these words: "I the undersigned driver hereby certify that the above figures are correct." He then receives a driver's pass, that is to say, a piece of paper upon which the cashier has entered the date, the driver's name and badge number, the number of the cab on the taximeter sheet which the driver has just signed, the date of that sheet, the amount paid in by the driver, the hour at which that payment was made, and the signature of the cashier who has received it. The driver takes this pass to the cab allotment department, where a clerk allots him a cab for the day and enters on the pass the licence number and police number of the cab and initials the pass so filled in. The driver then goes with the pass to the taximeter sheet department. There a clerk fills in from the pass into the taximeter sheet for the day the name and badge number of the driver and the police number and licence number of the cab. After the words "Day ending" the clerk fills in the date. Then follows a declaration, which the driver signs, in these words: "I the undersigned driver hereby declare that I have taken the cab bearing the above numbers in good condition," &c. Below the driver's signature a space is left in which the hour of his departure is to be entered. The clerk then initials the pass and hands it to the driver; the driver presents it to the gatekeeper, who enters the hour of the driver's departure and initials the pass. The driver then goes out for the day.

On the evening of Monday, March 29, 1909, two music hall artistes hired a motor cab driven by the prisoner from their abode to the Holborn Empire Music Hall, thence to the Crouch End Hippodrome, thence back to the Holborn Empire Music Hall, and thence back to their abode. For this the fare of 9*s*.

was demanded by the prisoner and paid by the passengers. The same thing happened on each succeeding night up to and including Saturday, April 3. On March 31, April 1, April 2, and April 3 the prisoner was observed by officials in the company's service to be driving his cab on this round with the lever and flag of the taximeter in a vertical position or so slightly depressed that the taximeter would not register any fare in respect of the distances travelled or time during which the cab was kept in attendance. On each of these days, when the prisoner returned to the company's garage, the taximeter shewed figures from which, if true, amounts varying from 19*s.* to 25*s.* 4*d.* would be due from him. These sums he paid to the company; but nothing was registered by the taximeter or paid by the prisoner in respect of the sums of 9*s.* received by him as aforesaid upon the days in question.

Upon these facts the prisoner was indicted under s. 1 of the Falsification of Accounts Act, 1875 (1), for falsifying an account and for committing other offences contrary to that Act.

The first count of the indictment charged that Alfred Solomons, the prisoner, was employed as servant to the General Motor Cab Company, Limited, on March 31, 1909, and did then unlawfully, wilfully, and with intent to defraud make a certain false entry in a certain account, to wit, a taximeter attached to a motor cab, which said account then belonged to and was in the possession of the said company, his employers, by entering in the said account certain figures meaning and intended by him to mean that the said Alfred Solomons as such servant of the said company had while driving a motor cab belonging to the said company for hire

(1) By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), s. 1, "if any . . . . servant or any person employed or acting in the capacity of a . . . . servant shall wilfully and with intent to defraud . . . . falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account, then in every such case the person so offending shall be guilty of a misdemeanour, and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years."

1909

REX v. SOLOMONS.

on their behalf earned fares amounting to a total sum of 1*l.* 5*s.* 4*d.* and no more on the day ending March 31, 1909, whereas in truth and in fact he the said Alfred Solomons had as such servant while driving the said cab for hire as aforesaid earned fares amounting to more than the said sum of 1*l.* 5*s.* 4*d.*, as he the said Alfred Solomons knew when he made the said false entry.

The third, fifth, and seventh counts charged the prisoner with similar offences on April 1, 2, and 3 respectively.

The second count charged that the prisoner was employed as servant to the company on April 1, 1909, and did then unlawfully, wilfully, and with intent to defraud make and concur in making a false entry in a certain account, to wit, a driver's sheet belonging to and in the possession of his employers, by entering and concurring in entering in the said account certain words and figures meaning and intended by him to mean that he as such servant of the said company had while driving a motor cab belonging to the said company for hire on their behalf earned fares amounting to a total sum of 1*l.* 5*s.* 4*d.* and no more on the day ending March 31, 1909, whereas in truth and in fact he had as such servant while driving the said cab for hire as aforesaid earned fares amounting to more than the said sum of 1*l.* 5*s.* 4*d.* on the said last-mentioned day, as he knew when he made and concurred in making the said last-mentioned false entry.

The fourth, sixth, and eighth counts charged the prisoner with similar offences on April 2, 3, and 5 respectively.

The ninth count charged the prisoner with omitting on April 3, 1909, certain material particulars from an account, to wit, a taximeter, by omitting to enter in the said account particulars of the full amount of a fare due from a passenger which it was his duty to enter. The tenth count charged him with falsifying the taximeter by omitting to set and keep the flag thereof in such a position that the taximeter fully and truly recorded the fare due, whereby a less sum than the true fare was recorded in the taximeter.

The last four counts in the indictment charged the prisoner under s. 1 of the Larceny Act, 1901 (1 Edw. 7, c. 10), with having received various sums of money for and on account of the

General Motor Cab Company and having converted them to his own use.

The trial took place at the Central Criminal Court before the Common Serjeant and a jury. The prisoner was convicted on all the above counts and was sentenced to five months' imprisonment with hard labour.

The prisoner appealed.

George Elliott, K.C., and *Cecil Fitch*, for the prisoner. Granting for the sake of argument that the prisoner was a servant within the meaning of s. 1 of the Falsification of Accounts Act, 1875, he has not falsified any account within the meaning of that enactment. The words of the section are "book, paper, writing, valuable security, or account." Neither has he made or concurred in making any false entry in an account; the words relating to this offence are "any such book, or any document, or account." The Act therefore clearly contemplates an account in writing and has no application to a mechanical contrivance such as a taximeter. (1)

Rufus Isaacs, K.C. (*R. D. Muir* and *Bigham* with him), for the Crown, was called upon to argue the point whether a taximeter was an account within the meaning of s. 1 of the Falsification of Accounts Act, 1875.

The Act nowhere says the account must be in writing. A tally stick would be an account within the section. An account may be brought into existence by means of a typewriter or by some other mechanical means. If the mechanical process is falsified the account is falsified; otherwise the Act might easily be reduced to a dead letter.

The judgment of the COURT (Lord Alverstone C.J. and Darling and Jelf JJ.) was delivered by

LORD ALVERSTONE C.J. It was not seriously contended that the taximeter sheet was not an account or that it had not been

(1) Counsel for the prisoner also contended that the prisoner was not a clerk, officer, or servant, or a person employed or acting in the capacity of a clerk, officer, or servant within the meaning of s. 1 of the Falsification of Accounts Act, 1875. The Court held that the finding of the jury on this point was amply justified by the evidence.

1909

REX v. SOLOMONS.

falsified. The sheet purports to state the total amount received on the day to which it relates. It is not disputed that the figures on these sheets were incorrect on the days in question, because the prisoner had driven the cab with the flag up, and so the taximeter from which the figures are taken gave no record of the miles actually run. The record of the day's work was therefore an incorrect record; if truly kept it would have recorded a number of miles greater than that actually shewn on the taximeter and from thence entered on the taximeter sheet. The prisoner has kept back three-fourths of the difference between the amount recorded and the amount received and has certified that the amount recorded is the correct amount received. He has therefore clearly concurred in making a false entry in the taximeter sheet, which is an account or document which it was his duty to render to or see prepared for his employers. It follows that the prisoner was properly convicted on counts 2, 4, 6, and 8 of the indictment.

But, further than this, in our opinion an offence under this statute was committed when the prisoner falsified the mechanical record from which the calculation of the amount received was made up. There are now in use a number of mechanical means for counting money and calculating sums received or paid, and it would be a serious thing to say that to falsify the mechanical means whereby an account is brought into existence is not to falsify an account within the meaning of this Act.

Therefore in our opinion counts 1, 3, 5, and 7, which charge the prisoner with falsifying the taximeter itself, are also good, and this appeal must be dismissed.

Appeal dismissed. (1)

Solicitor for appellant: *Henry George Danger.*

Solicitors for the Crown: *Van Praagh & Gaylor.*

(1) The Court also held that the prisoner was properly convicted on the last four counts of the indictment charging the prisoner under s. 1 of the Larceny Act, 1901 (1 Edw. 7, c. 10).

W. H. G.

MARRIOTT *v.* YEOWARD BROTHERS.

1909
June 29;
July 23.

Ship—Contract of Carriage—Passengers' Luggage—Exception of "loss by whatsoever cause or in whatever manner occasioned" — Theft by Shipowners' Servants.

Passengers' luggage was carried on board the defendants' ship on the terms of a ticket containing a condition that the defendants should not be responsible "for any loss, damage, injury . . . . of or to passengers or their baggage or effects . . . . by whatsoever cause or in whatever manner . . . . occasioned, and whether arising from the act of God, King's enemies, ... thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer":—

Held, that the condition protected the defendants from liability to make good a loss occasioned by the felonious act of their servants.

Trial of action before Pickford J. without a jury.

The action was brought by Mrs. Marriott to recover damages for the loss of certain personal effects carried by the defendants as passenger's luggage on board their ship *Ardeola* on a voyage from Santa Cruz in the Canary Islands to Liverpool. The plaintiff in the early part of February, 1908, being desirous of going to the Canary Islands with her daughter, arranged to go by the defendants' line and took a return ticket from Liverpool to Santa Cruz and back. She sent a cheque for a portion of the passage money some days before the vessel sailed, and the defendants replied that on receipt of the balance they would send the ticket. The plaintiff, however, for her own convenience, requested them to hand the ticket to her on board the ship just before sailing from Liverpool. When the ticket was handed to her she did not examine it carefully. She saw that it had some writing or printing on it besides her name, but what it was she did not notice. The ticket was in the following terms: "Cabin passage ticket. Mrs. Ada Marriott and Miss Marriott. Per s.s. *Ardeola*. Sailing date February 12, 1908. To return (unless prevented by unforeseen circumstances). Passage money 25*l*. 4*s*. Berth number 35/36. This contract is

1909

MARRIOTT v. YEOWARD BROTHERS.

made subject to the following conditions and exceptions." (1) Then followed a number of conditions, of which No. 7 was in these terms: "The steamer her owners and/or charterers are not responsible for any loss, damage, injury, delay, detention (or maintenance or expense during same) of or to passengers or their baggage or effects, or for the non-continuance or non-completion of the voyage, by whatsoever cause or in whatever manner the matters aforesaid may be occasioned, and whether arising from the act of God, King's enemies, restraint of princes rulers or people, disturbances, perils of the seas rivers or navigation, collision, fire, thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer her owners and/or charterers, or from restriction of quarantine or from sanitary regulations or precautions which the ship's officers or Local Government authorities may deem necessary, or the consequences thereof or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise." The plaintiff did not at any time subsequently to the receipt of the ticket read what was printed on it or know that it contained conditions. Upon the return voyage the plaintiff alleged that the articles which formed the subject of the claim were abstracted from two of the plaintiff's trunks which were locked and were being carried in the hold under the sole control of the defendants' servants. The defendants by way of defence to the claim relied on condition No. 7 on the ticket. The plaintiff in reply denied that she had any knowledge of the condition or that she was bound by it, and further alleged that the loss was due to the felonious acts of the defendants' servants and that such acts were not covered by the condition.

The action came on for trial, and at the close of the case the judge, at the request of the plaintiff, adjourned the hearing to

(1) The words "This contract is made subject to the following conditions and exceptions" were printed in capital letters of the size known as "brevier," about $\frac{3}{32}$ of an inch in height.

allow of certain further evidence being obtained from Santa Cruz. Pending the arrival of that evidence he heard arguments on the question of law whether the condition on the ticket would afford a protection to the defendants in the event of the judge finding that the loss was due to the felonious acts of the defendants' servants.

Hemmerde, K.C., and *G. A. Scott*, for the plaintiff. The conditions upon the ticket formed no part of the contract of carriage. The plaintiff did not know that there were any conditions on the ticket, and the defendants did not do what was necessary to give the plaintiff reasonable notice of the conditions in accordance with the principle laid down by Mellish L.J. in *Parker* v. *South Eastern Ry. Co.* (1) The plaintiff's attention should have been drawn to the fact that there were conditions. In *Richardson* v. *Rowntree* (2), where a passenger on board a ship knew that there was writing or printing on the ticket, but did not know that the writing or printing contained conditions relating to the contract of carriage, it was held by the House of Lords that in the absence of something being said to draw her attention to the fact of the conditions there was evidence on which a jury could properly find that the shipowners had not done what was reasonably sufficient to give her notice of them. Secondly, even if the plaintiff is bound by the conditions, they do not protect the defendants, for they do not except loss by the felony of their servants. It has been held in *Steinman* v. *Angier Line* (3) that the words "thieves whether on board or not" do not include thefts by persons in the service of the ship. Nor do the words "any act neglect or default of the . . . . mariners or other servants of the steamer" cover criminal acts of the crew. They were meant to refer to something connected with the management of the ship. They are general words which must be read as ejusdem generis with what immediately precedes, "accidents to or by machinery, boilers or steam, unseaworthiness of the steamer." That this is what was meant is emphasized by the words at the end of the condition as to the "passengers taking upon themselves all risk whatsoever of the passage."

(1) (1877) 2 C. P. D. 416. (2) [1894] A. C. 217.
(3) [1891] 1 Q. B. 619.

1909

MARRIOTT v. YEOWARD BROTHERS.

Loss by felony is not a risk of passage, for it has nothing to do with the person being a passenger; it might equally be incurred on shore. In order to exempt the shipowner from liability for loss of the goods the language must be clear and unambiguous. In *Steinman's Case* (1) Bowen L.J. said: "If it was intended to relieve the shipowner from liability for thefts committed by persons in the ship's service clear and explicit language to that effect should have been used." Here the language is at least ambiguous.

Keogh (*Horridge, K.C.*, with him), for the defendants. The plaintiff is bound by the conditions on the ticket. If she knew there was writing or printing on it, it is immaterial whether she read it or not; she omitted to do so at her peril. All the authorities on this subject were considered in *Watkins* v. *Rymill*. (2) Stephen J., in delivering the judgment of the Court, said that if a form of contract "is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not." He then goes on to state that that general rule is subject to exceptions, amongst which is a case where the nature of the transaction is "such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all." But a person of ordinary intelligence cannot reasonably suppose that a document such as the ticket of the kind used in the present case contained no terms at all. Stephen J. was referring to such a document as that instanced by Mellish L.J. in *Parker's Case* (3), a ticket received at a turnpike gate on payment of the toll, a piece of paper which no one would expect to contain any contract. Mellish L.J. expressly said that "if a person who ships goods to be carried on a voyage by sea receives a bill of lading signed by the master, he would plainly be bound by it, although afterwards . . . . he might swear that he had never read the bill of lading, and that he did not know that it contained the terms of the contract of carriage." Then if the plaintiff is bound by the conditions, those conditions are sufficient to protect the

(1) [1891] 1 Q. B. 619. (2) (1883) 10 Q. B. D. 178.
(3) 2 C. P. D. 416.

defendants. The parties must be taken to have known of the decision in *Steinman's Case* (1) and to have added the words "any act . . . . whatsoever of the . . . . servants of the steamer" for the purpose, amongst others, of filling up the gap in the exemption from liability created by that decision. The question is whether those words are sufficient to effect that purpose. The defendants do not rely upon the words "neglect or default," for they do not include wilful acts such as theft, and accordingly in *Shaw* v. *Great Western Ry. Co.* (2) it was held that a loss of goods by the theft of a railway company's servant, without negligence on the part of the company, was not a loss "occasioned by the neglect or default of the company or its servants" within the meaning of s. 7 of the Railway and Canal Traffic Act. But the words "any act" must in the absence of any authority to the contrary be construed in their ordinary and natural sense, and as such include theft. The words at the end of the condition "the passengers taking upon themselves all risk whatsoever of the passage" do not in any way qualify what has gone before. In *Shaw* v. *Great Western Ry. Co.* (2) Wright J. spoke of a theft on a railway train as a "risk of the road." If then theft is a "risk of passage" by land, it must equally be so by sea.

Hemmerde, K.C., in reply.

Cur. adv. vult.

July 23. PICKFORD J. This is an action brought by the plaintiff against the defendants to recover damages for the loss of articles carried by her in her box as luggage on a voyage from Santa Cruz in the Canary Islands to Liverpool. The defendants deny the loss and also set up in their defence certain conditions which they allege were conditions of the contract of carriage which appeared on the ticket given to the plaintiff. The plaintiff's answer is twofold—first, that those conditions are no part of the contract, and, secondly, that if they are they do not protect the defendants, inasmuch as the loss was occasioned by the felonious acts of the defendants' servants. The case was tried before me some time ago, and at the end of the case the plaintiff's counsel applied to me to give him the opportunity of

(1) [1891] 1 Q. B. 619. (2) [1894] 1 Q. B. 373.

1909

MARRIOTT v. YEOWARD BROTHERS.

Pickford J.

getting further evidence from Santa Cruz with reference to the facts of the loss, and I gave him leave to do so. The result is that until that evidence is produced I am not in a position to determine the question lying at the root of the claim, namely, whether the loss was or was not in fact occasioned by the felonious act of the defendants' servants. But I was invited to decide the question of law, whether, if the loss was so occasioned, the defendants are protected by the conditions on the ticket. For the purpose of the judgment I am about to deliver I assume that the loss was occasioned by the felonious act of the defendants' servants. Under those circumstances the first point that I have to determine is whether the conditions on the ticket did or did not form part of the contract. That question is one of fact. I was indeed invited by the defendants' counsel to hold as matter of law, upon the authority of the well-known case of *Watkins* v. *Rymill* (1), that the mere delivery and acceptance of the ticket with the conditions upon it was sufficient to make the conditions part of the contract. But that I am not at liberty to do. The case of *Richardson* v. *Rowntree* (2) in the House of Lords clearly decided that the acceptance of the ticket does not of itself necessarily make all the conditions upon that ticket a part of the contract. It decided that the proper questions to be left to the jury were those which were formulated by the majority of the Court of Appeal in *Parker* v. *South Eastern Ry. Co.* (3), namely, (1.) whether the plaintiff knew that there was writing or printing on the ticket; (2.) whether the plaintiff knew that the writing or printing on the ticket contained conditions relating to the terms of the contract of carriage; and (3.) whether the defendants did what was reasonably sufficient to give the plaintiff notice of the conditions. For the purpose of determining the answer to the third of those questions I think that the cases of *Richardson* v. *Rowntree* (2) and *Acton* v. *Castle Mail Packets Co.* (4) shew that the jury must take into consideration the class of persons with whom the contract is made. In *Richardson's Case* (2) stress was laid upon the fact that the ticket was for a steerage passenger, a class of persons of whom

(1) 10 Q. B. D. 178.
(2) [1894] A. C. 217.
(3) 2 C. P. D. 416.
(4) (1895) 73 L. T. 158.

many, as Lord Ashbourne observed, have little or no education. In *Acton's Case* (1) stress was equally laid by Lord Russell of Killowen in his judgment on the fact that the plaintiff was a business man. The plaintiff in the present case was neither the one nor the other; she was certainly a person of education and intelligence, but at the same time she was presumably not a person of the business habits of a man of affairs. The question is whether the defendants did what was sufficient to give notice of the conditions to the class of persons to which the plaintiff belonged. The case of *Parker* v. *South Eastern Ry. Co.* (2) shews that I am not to consider the idiosyncrasies of the particular passenger. Mellish L.J. in delivering judgment there said: "The railway company as it seems to me must be entitled to make some assumptions respecting the person who deposits luggage with them; I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness." I think I ought also to conclude from that judgment that I ought to take into consideration any diminution of the means of information which is brought about by the plaintiff for her convenience. Those, then, are the principles which it seems to me I have to apply to the facts of this case. Now, in the first place, the plaintiff was a saloon passenger, one of a class of persons who may be expected to be able to read and to be endowed with sufficient intelligence to understand an ordinary sentence in the English language. It was suggested that, being a lady, she was perhaps not able to take in the meaning of these conditions as well as an ordinary man, but I have seen her in the witness-box, and she certainly is a person of education and intelligence, and perfectly capable, if she sees a

(1) 73 L. T. 158. (2) 2 C. P. D. 416.

1909

MARRIOTT v. YEOWARD BROTHERS.

Pickford J.

statement on the ticket that it is "subject to the following conditions," of understanding that that statement means what it says. The ordinary practice of the defendants was to send a ticket in the form used in the present case to the intending passengers some days before the vessel sailed; and it seems to me that if they send to the passengers a perfectly clear and legible document like this in such time as to allow them every opportunity of examining it before sailing they do take reasonable means to bring the conditions to the notice of the passengers. In this particular case the defendants, for the plaintiff's convenience, did not follow their ordinary practice, she having asked that the ticket should meet her upon the boat; and under those circumstances the plaintiff cannot complain that the defendants did not take reasonable steps to give notice of the conditions merely because they did not send her the ticket some time before sailing. Applying then to the facts of this case the questions formulated in *Parker* v. *South Eastern Ry. Co.* (1), I come to the conclusion and find as facts that the plaintiff knew there was writing or printing on the ticket in addition to her name, that she did not read it or know that it contained conditions, but that the defendants had done what was reasonably sufficient to bring the conditions on the ticket to the notice of the plaintiff.

Assuming that the conditions form part of the contract, the next question is whether they protect the defendants against the felonious act of their servants. In order to answer that one must examine closely the language of the condition upon which the defendants rely, bearing in mind the principle that a man cannot by stipulation excuse himself for the wrongful act of his servants unless he does so in plain and unambiguous language. If the language is ambiguous it must be construed against him, and whether particular language is ambiguous or not is a matter which it is not always easy to determine. What is unambiguous to one mind may be ambiguous to another. Now the condition in question begins with these words: "The steamer her owners and/or charterers are not responsible for any loss, damage, injury, delay, detention (or maintenance or expense during same) of or to passengers or their baggage or effects, or for the

(1) 2 C. P. D. 416.

non-continuance or non-completion of the voyage, by whatsoever cause or in whatever manner the matters aforesaid may be occasioned." If it stopped there I do not think there could be much doubt that it was meant to protect and did protect the defendants from everything. I think that is quite clearly shewn by the case of *Ashenden* v. *London, Brighton, and South Coast Ry. Co.* (1) The words there were "will not be liable in any case." Those words "in any case" can hardly be regarded as wider than "by whatsoever cause or in whatever manner the matters aforesaid may be occasioned," and they were clearly held by the Court to cover the wilfully wrongful act or wilful misconduct of the defendants. That case arose under the Railway and Canal Traffic Act, and the question was whether the condition was reasonable. If it protected the defendants against the felonious act or wilful misconduct of their servants it was unreasonable; if it did not, the Court could have held it to be reasonable. Kelly C.B. said: "The question whether it is a reasonable agreement depends on the terms used. If they are absolute and unconditional to the effect that the company shall not be liable in any event, it is clear on the authority of *Peek* v. *North Staffordshire Ry. Co.* (2) that the plaintiff is entitled to recover. The question therefore is whether the agreement when fairly construed is in its terms absolute and unconditional, or whether certain qualifications or exceptions, such as that the company are to be liable only in case of gross negligence, or for the wilful misconduct or felony of their servants, are to be read as included in this agreement. If a few words had been added importing those qualifications this would have been a lawful agreement. In the absence of those words I think the agreement is clearly unreasonable, because it provides not only for the accident that occurred without negligence but is absolute in its terms that, in no case, shall the company be liable." That seems to me to be a clear authority that if those first words of the condition stood alone they would cover felony of the defendants' servants. But then the condition goes on to set out a number of causes from which loss might arise, and the

(1) (1880) 5 Ex. D. 190. (2) (1862) 10 H. L. C. 473.

1909

MARRIOTT v. YEOWARD BROTHERS.

Pickford J.

question is whether that enumeration diminishes the effect of what has gone before. It goes on "and whether arising from the act of God, King's enemies, restraint of princes rulers or people, disturbances, perils of the seas rivers or navigation, collision, fire, thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer, her owners and/or charterers, or from restriction of quarantine, or from sanitary regulations or precautions which the ship's officers or Local Government authorities may deem necessary, or the consequences thereof, or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise." The words "any act neglect or default whatsoever" are quite unqualified. They are not "any act unless felonious," but "any act." It was suggested that the acts must be confined to acts in the navigation of the ship, but any fault in the navigation of the ship would seem to be covered by "neglect or default." Prima facie I should say that "any act" means any act, especially when it follows the very comprehensive clause that the defendants will not be responsible for loss occasioned "by whatsoever cause or in whatever manner." It was argued that the words "any act neglect or default" are general words and must be read as ejusdem generis with what goes before. My answer to that is that I do not think they are general words. I think Mr. Keogh properly pointed out that the general words come much lower down, "or otherwise howsoever." I think the words "any act neglect or default whatsoever of the . . . . servants of the steamer" are in a category of their own. But even if they are to be read as ejusdem generis with what precedes, we find them preceded by the words "thieves (whether on board or not)," which words have been held not to apply to thefts by the owners' servants. So that, even if they are to be treated as general words, in holding them to include thefts by the defendants' servants I should be reading them as ejusdem generis with one

of the preceding genera. But I do not rely upon that, for I do not think that they are general words at all.

It was also argued that those words were limited by the last clause of the condition as to "the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise." It was said that the expression "risk of the passage" imports that the excepted risks were confined to those which are incidental to the navigation or handling of the ship or the handling of the luggage, and would not include a loss of the description complained of. I do not think that that would be the proper construction of that clause even if it were read by itself. But it seems to me that it is not to be read by itself. It must be read as a part of and along with the whole seventh condition, which starts with a broad statement that the owners will not be responsible for loss occasioned by whatsoever cause or in whatever manner. It goes on to say that that shall apply even if it be from the act, neglect, or default of the defendants' servants, and winds up by saying that the passenger takes the whole risk of the passage upon himself. It is clear to me that the intention of the condition was to exempt the defendants from liability from any possible cause. I think the conditions do apply, and that they protect the defendants even if the loss was caused by the felony of the defendants' servants. There must be judgment for the defendants.

Judgment for the defendants.

Solicitor for plaintiff: *W. Webb-Ware.*

Solicitors for defendants: *Walker, Son & Field, for Weightman, Pedder & Co., Liverpool.*

J. F. C.

C. A.
1909
July 7, 8, 31.

[IN THE COURT OF APPEAL.]

REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB.

Ship—Charterparty—Lien—Demurrage payable Day by Day—Charges.

A charterparty provided that the charterer should be allowed so many running days for loading and that the discharge should be effected according to the custom of the port; that, in the event of the detention of the vessel by the charterer beyond the laying days, demurrage should be paid at a specified rate "day by day as falling due"; and that the owner should have a lien for "all freight, demurrage, and all other charges whatsoever."

In an action by the shipowner against an indorsee of the bills of lading, which incorporated the provisions of the charterparty, to determine the extent of the lien:—

Held, that the fact that demurrage was payable day by day as falling due did not deprive the shipowner of his lien, and that the lien applied to demurrage at the port of loading.

Gardner v. *Trechmann*, (1884) 15 Q. B. D. 154, and *Pederson* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267, distinguished.

Held, further, that as against an assignee of the bill of lading the word "charges" did not include charges not specifically provided for in the charterparty.

Appeal from a decision of Bray J. (1)

The plaintiffs were the owners of the barque *Superior*. By a charterparty dated February 27, 1907, Willenz & Co. chartered the *Superior* from the plaintiffs to carry a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ linseed from Buenos Aires to a safe port in the United Kingdom and there deliver the cargo as per bills of lading on being paid freight as follows: 15*s*. 6*d*. per ton of 2240 lbs.

The following were the material clauses of the charterparty:—

"5. The freight shall be paid as follows, viz.:—sufficient cash for ship's use (if required by the master) to be supplied on account of freight at port of loading not exceeding one third part, subject to 7½ per cent. commission to cover all charges, and the balance of freight on the right and true delivery of the cargo in cash without discount."

(1) [1909] 1 K. B. 948.

"9. Charterers have the option of shipping other lawful merchandise, in which case freight to be paid on vessel's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but ship not to earn more freight than she would if loaded with a full cargo of wheat and/or maize in bags. All extra expenses for loading such merchandise over heavy grain to be paid by charterers."

"12. Thirty-five running days (Sundays, holidays, and strikes excepted) to be allowed the said charterers (if the ship be not sooner despatched) for loading, and the discharge to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge the cargo."

"13. Should the vessel be detained by charterers or their agents over and above the said laying days, demurrage shall be paid to the said master at the rate of fourpence per net register ton for each and every day's detention afterwards, to be paid day by day as falling due."

"15. Wharfage dues, if any, for loading to be for account of the charterers."

"19. The owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever."

"23. Five per cent. brokerage is due by the ship on the above freight, dead freight, and demurrage, ship lost or not lost, cancelled or not cancelled, on signing this charterparty to Erfjord & Co., and in the event of cancelment consignment to remain in their hands or their agents'."

Written notice that the *Superior* was ready to load was duly given on April 23, 1907, and the lay days commenced to run on April 24. Allowing for Sundays and holidays, the thirty-five lay days expired on June 7.

On July 6, 1907, 617 tons of cargo having then been shipped by the charterers, and space for 1263 tons remaining, the charterers gave notice to the master that they did not intend to load any further cargo, and they requested him to proceed with the cargo then on board. The master acted on that

C. A. 1909

REDERI-ACTIESEL-SKABET "SUPERIOR" v. DEWAR & WEBB.

request; no more cargo was loaded, and the ship sailed on July 15.

The *Superior* arrived at London on or about September 9, 1907, and the plaintiffs exercised their lien on cargo for 791*l.* due for thirty-eight days' demurrage at the port of loading, for 915*l.* for dead freight, and for 255*l.* paid by the plaintiffs at Buenos Aires for and at the request of the charterers.

The defendants were the indorsees of the bills of lading, which excepted certain perils and contained the words "all other conditions and exceptions as per charterparty." After the arrival of the ship at London the defendants agreed with the plaintiffs that, in consideration of the plaintiffs releasing the cargo from the lien, the defendants would be personally responsible for and would pay to the plaintiffs any sum, not exceeding the amount claimed by the plaintiffs as above, for which it might be proved that the plaintiffs were legally entitled to exercise a lien upon the cargo.

The plaintiffs brought an action against the defendants for a declaration that they were entitled to exercise a lien for the said three sums, and payment thereof by the defendants. The action was tried by Bray J. without a jury.

The defendants alleged that there was a strike at Buenos Aires which prevented any loading of the *Superior* between April 25 and May 14, but the judge found as a fact that there was no strike.

The learned judge held that the lien included demurrage at the port of loading, and he allowed the plaintiffs' claim for demurrage up to and including July 14; he held further that the word "charges" did not include dead freight, but that it was not necessarily confined to charges specifically mentioned in the charterparty, but included certain expenses incurred by the ship's agents at Buenos Aires at the request of the charterers' agents.

The defendants appealed from this judgment except in so far as it excluded dead freight from the lien.

Scrutton, K.C., and *Leck*, for the appellants. The lien conferred by clause 19 of the charterparty in respect of demurrage

applies to demurrage at the port of discharge only. Under clause 13 demurrage is to be paid day by day as it falls due. Each day's demurrage could therefore have been sued for at once, and when demurrage is due before the lien is to attach there can be no lien: *Gardner* v. *Trechmann* (1); *Pederson* v. *Lotinga.* (2) See also *Kirchner* v. *Venus* (3) and *Gray* v. *Carr.* (4) The reference in the bill of lading to the conditions of the charterparty means that the consignee when taking delivery is to perform such conditions as are applicable to the delivery of the goods in question; at all events it was not intended to include demurrage at the port of loading: *Serraino & Sons* v. *Campbell* (5); *Manchester Trust* v. *Furness* (6); *Smith* v. *Sieveking.* (7) If the shipowner desired to make the consignee liable for matters occurring at the port of loading, for which the consignee would naturally not be responsible, he ought to use plain language. Even assuming that as against the consignee the lien applies to demurrage at the port of loading, the plaintiffs' claim is excessive. As regards the charges, the lien for charges cannot as against the consignee include charges not specifically referred to in the charterparty. "Charges" as against the holder of the bill of lading must mean charges in respect of the goods which he has to receive only. Bray J. has read the charterparty in favour of the shipowner rather than in favour of the consignee.

Bailhache, K.C., and *A. A. Roche*, for the respondents. Prima facie in the absence of any indication in the charterparty to the contrary a lien for demurrage covers demurrage at the port of loading (in a case where there is demurrage proper at the port of loading) as well as demurrage at the port of discharge. On the other hand, where at the port of loading there is no demurrage in the proper sense of the term as distinguished from damages for detention, but at the port of discharge there is demurrage in the proper sense, then the lien does not extend to the damages for detention: *Kish* v. *Cory.* (8) Where a lien is given by the

(1) 15 Q. B. D. 154.
(2) 28 L. T. (O.S.) 267.
(3) (1859) 12 Moo. P. C. 361, 390.
(4) (1871) L. R. 6 Q. B. 522, 538.
(5) [1891] 1 Q. B. 283, 290.
(6) [1895] 2 Q. B. 539, 545.
(7) (1855) 4 E. & B. 945; affirmed 5 E. & B. 589.
(8) (1875) L. R. 10 Q. B. 553.

C. A. 1909

REDERI-ACTIESEL-SKABET "SUPERIOR" v. DEWAR & WEBB.

charterparty, that lien is preserved against the holder of a bill of lading framed in terms such as the present one: Carver's Carriage by Sea, 4th ed., s. 671. The effect is to incorporate all the terms of the charterparty except such as are inconsistent with the bill of lading.

[KENNEDY L.J. In the cases cited in Carver, namely, *Porteus* v. *Watney* (1), *Gray* v. *Carr* (2), and *Wegener* v. *Smith* (3), the lien was for demurrage at the port of discharge.]

The only reason alleged why the lien should not extend to the demurrage in this case is founded upon the provision in the charterparty that demurrage shall be paid day by day. It is said that that is money payable in advance and that there cannot be a lien for money payable in advance. That is not true as a general proposition. The dictum of Lindley L.J. in *Gardner* v. *Trechmann* (4) has not been accepted as laying down any principle of general application in relation to the construction of charterparties and ought to be treated as having reference only to the particular charterparty there in question. The question there was to which of two rates of freight the lien applied, and the ratio decidendi was that, there being an inconsistency between the charterparty and the bill of lading, the bill of lading was to prevail. It was also held, upon the construction of the charterparty itself, that there was no lien for the higher freight.

[KENNEDY L.J. referred to *Christoffersen* v. *Hansen*. (5)]

In *Kirchner* v. *Venus* (6) the decision was that money which was called freight was not freight in fact, and therefore the lien did not apply. In *Pederson* v. *Lotinga* (7) it was held that the combination of a clause providing for payment of demurrage day by day and a cesser clause might exclude demurrage at the port of loading. But that case is distinguishable because there is here no cesser clause, and therefore there is nothing to indicate that the lien should be limited to events occurring after the loading, and the lien extends to all demurrage.

(1) (1878) 3 Q. B. D. 534.
(2) L. R. 6 Q. B. 522.
(3) (1854) 15 C. B. 285; 24 L. J. (C.P.) 25.
(4) 15 Q. B. D. 154, 159.
(5) (1872) L. R. 7 Q. B. 509.
(6) 12 Moo. P. C. 361.
(7) 28 L. T. (O.S.) 267.

Moreover, *Pederson* v. *Lotinga* (1) was decided at a time when the law as to demurrage was less well settled than it is to-day, and it is doubtful whether it would be decided in the same way at the present time. As regards the charges, the language of clause 19 is very wide and extends to all charges which the charterer ought to have paid on the ship's account and which at his request or by his consent the shipowner has paid for him. [They also cited *W. N. White & Co.* v. *Furness, Withy & Co.* (2) and *Sanguinetti* v. *Pacific Steam Navigation Co.* (3)]

Scrutton, K.C., in reply, cited *Hansen* v. *Harrold* (4); *Fry* v. *Chartered Mercantile Bank of India* (5); *Chappel* v. *Comfort.* (6)

Cur. adv. vult.

July 31. KENNEDY L.J. now delivered the judgment of the COURT (Cozens-Hardy M.R., Farwell and Kennedy L.JJ.) as follows:

In this case there are four points which have been put before this Court on appeal from the judgment of Bray J.

Three of these can be disposed of very shortly. They are points of detail, and it is convenient to deal with them first. The appellants say that the learned judge, in dealing with the plaintiffs' claim for demurrage, ought to have found, as a matter of fact, that the loading at Buenos Aires was for a considerable period prevented by a strike of labourers and stevedores. There is an exception in the charterparty, "strikes excepted," and the defendants contended before the learned judge that, at all events for a portion of April and May, this exception operated. The learned judge has decided against them, on the ground, in the first place, that during the period of the strike no cargo at all was provided by the charterers, and, secondly, on the ground that the strike was not a general strike, but a partial strike, and that it is not shewn that if the charterers were ready to load it would have prevented the loading of this vessel. Other vessels were being loaded, and one, the *Mecca*, was being loaded by the

(1) 28 L. T. (O.S.) 267.
(2) [1895] A. C. 40.
(3) (1877) 2 Q. B. D. 238.
(4) [1894] 1 Q. B. 612, 620.
(5) (1866) L. R. 1 C. P. 689.
(6) (1861) 10 C. B. (N.S.) 802.

C. A. 1909

REDERI-ACTIESEL-SKABET "SUPERIOR" v. DEWAR & WEBB.

charterers themselves. We have no reason, we think, for differing from the learned judge on this point.

The next matter of appeal also is a matter of fact affecting the plaintiffs' demurrage claim. The defendants do not dispute a detention of the ship at the loading port up to July 10. The learned judge has allowed the plaintiffs' claim for damages beyond this date up to July 14. We agree with the appellants' counsel that the evidence as to the period between July 10 and 15 is meagre. The question is, Was it sufficiently strong to justify Bray J.'s finding in the plaintiffs' favour? On July 10, as we understand the facts, the necessary trimming of the cargo was completed. On July 11 the ship moved into the roads. The plaintiffs' case is that the delay from that date to the date of sailing was caused by the difficulties in obtaining clearance. The learned judge has allowed the claim up to and including July 14. We are not prepared to say that he was not justified in taking this view upon the evidence before him, which included the examination and cross-examination of the captain of the *Superior*.

The third point is one of a minor sort in matter of amount. Bray J. has allowed in the plaintiffs' claim for "charges," for which a lien is given in clause 19 of the charterparty, charges not specifically mentioned in the charterparty. It appears that during the loading at Buenos Aires, which seems to have been a troublesome and tedious business owing to the impecuniosity of the charterers' agents there, certain expenses outside the expenses mentioned in the charterparty were incurred by the ship's agents, with the consent, if not at the request, of the charterers' agents. They were expenses, no doubt, which benefited the charterers by facilitating the loading. But we have to consider what charges are covered by clause 19 so as to be justifiably exacted from the consignees under the bill of lading, against whom the shipowners have claimed to exercise the right of lien in respect of these expenses as well as in respect of charges specifically mentioned in the charterparty.

In our opinion the judgment of Bray J. in allowing these expenses to be treated as charges for which the lien is available has given the plaintiffs more than they are entitled to. The

19th clause is very wide in its terms, "all freight, demurrage, and all other charges whatsoever"; but as against the assignee of the bill of lading we do not think it can rightly be held to give the shipowner a lien upon his goods for expenses incurred by arrangement between shipowner and charterer outside any charterparty obligation. We do not know what the items in question are, and we can only state the principle upon which in this matter the accounts ought to be taken. The parties know what the items are, and there will be no difficulty in adjusting the account.

We now come to the appellants' fourth point, in which lies the real substance of this appeal. They say that there is no lien enforceable against them in respect of demurrage of the *Superior* at the port of loading. The defendants are the consignees of the cargo of the *Superior* under a bill of lading which beyond question incorporates the condition of the charterparty in clause 19, to which we have already referred. "The owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever." Turning to the demurrage clauses (Nos. 12 and 13) in the typewritten copy furnished to this Court, we find this: "12. Thirty-five running days (Sundays, holidays, and strikes excepted) to be allowed the said charterers (if the ship be not sooner despatched) for loading, and the discharge to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge the cargo." "13. Should the vessel be detained by charterers or their agents over and above the said laying days, demurrage shall be paid to the said master at the rate of fourpence per net register ton for each and every day's detention afterwards, to be paid day by day as falling due." The concluding words ("or discharge the cargo") of clause 12 are evidently either inserted or (if the original charterparty was a printed form) allowed to stand there in error; but it is quite clear, and it is, as we shall hereafter point out, deserving of notice, that under these clauses demurrage properly so called is provided for only at the port of loading, where thirty-five lay days are given

C. A. 1909

REDERI-ACTIESEL-SKABET "SUPERIOR" v. DEWAR & WEBB.

and a stipulated demurrage rate of fourpence per ton per diem is provided for any excess of time in loading. At the port of discharge the only provision is that the "discharge is to be effected according to the custom of the port," and the shipowners' remedy for detention there is, therefore, in the nature of damages.

Now, the appellants, the consignees of cargo under a bill of lading which incorporates by reference these conditions of the charterparty, contend that they do not operate to give the plaintiffs as against them any lien exercisable upon the cargo for the demurrage which was incurred at the port of loading. They contend that, although clause 19 gives an absolute lien and charge "for the recovery and payment of all freight, demurrage, and all other charges whatsoever," the lien does not apply to the demurrage incurred at the port of loading, because, by the terms of clause 13, the demurrage at the stipulated rate is "to be paid day by day as falling due."

Now there certainly is no principle of law which prevents a right of lien upon goods being superadded to a right of action of debt for the money which the lien secures, but the defendants' contention is based upon the judgments in two cases—*Pederson* v. *Lotinga* (1), decided by the Queen's Bench in 1857, and *Gardner* v. *Trechmann* (2), in the Court of Appeal in 1884, before Lord Esher M.R., Cotton L.J., and Lindley L.J. In our opinion, there is nothing in the judgments in either of these cases which can rightly be held to justify the view which the defendants put forward as to the effect of the documents in the present case.

Pederson v. *Lotinga* (1) is one of a large group of often difficult cases in which the Court has had to construe a charterparty in reference to a "cesser" clause—a clause, that is to say, containing a release of the charterer from liability under the charterparty as soon as the vessel is loaded and bills of lading have been given—and to say whether in the particular case the release applies to both demurrage accrued at the port of loading and to demurrage at the port of discharge, or only to the latter. The tendency of the decisions—we think it may now be treated as a general rule—is to treat the cesser in regard to extent as

(1) 28 L. T. (O.S.) 267; 5 W. R. 290. (2) 15 Q. B. D. 154.

correlative and corresponding to the lien upon the cargo reserved in the particular charterparty. In *Pederson* v. *Lotinga* (1) the shipowner was suing the charterer for demurrage. The charterparty provided that at the port of loading, after the agreed days for loading, the master was to receive 5*l.* a day for demurrage "day by day." For the port of discharge the language is different. There was to be demurrage after the laying days at 5*l.* a day. It also contained a "cesser" clause and a provision that the shipowners should rest on their lien for freight and demurrage. The Court held that the express agreement that the charterer should pay 5*l.* a day "day by day" shewed that the lien clause in regard to demurrage must apply only to the demurrage at the port of discharge. In other words, the express terms of the demurrage clause "day by day" expressly gave the shipowner a vested right of action, and the lien clause in those circumstances was to be interpreted as limited in its application to demurrage at the port of discharge, in regard to which the language was different. The reasoning of *Pederson* v. *Lotinga* (1) is commented on and elucidated by Blackburn J. in *Christoffersen* v. *Hansen* (2) and is carefully explained by Cleasby B. in *Francesco* v. *Massey*. (3)

Gardner v. *Trechmann* (4) was not a demurrage case. The shipowner there was insisting upon a lien for the difference between the charterparty freight and the bill of lading freight. There was a clause, "the freighter's liability to cease when the cargo is shipped, provided the same is worth the freight, dead freight, and demurrage on arrival at the port of discharge, the owner or his agent having an absolute lien on the cargo for freight, dead freight," &c. There was also a clause, "It is further agreed the captain to sign bills of lading as presented, and at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." The bill of lading freight was in fact less than the charterparty freight, and the Court held on both of two

(1) 28 L. T. (O.S.) 267; 5 W. R. 290.

(2) L. R. 7 Q. B. 509, at p. 514.

(3) (1873) L. R. 8 Ex. 101, at p. 105.

(4) 15 Q. B. D. 154.

C. A. 1909

REDERI-ACTIESEL-SKABET "SUPERIOR" v. DEWAR & WEBB.

grounds that there was no lien against the bill of lading consignee for the difference. The bill of lading incorporated the charterparty only so far as its terms were consistent with the terms of the bill of lading, and there could be no lien for freight beyond the freight expressly named in the bill of lading. So that, even if the lien clause would have applied as between the parties to the charterparty to the difference between the charterparty freight and the bill of lading freight it was ousted by the terms of the bill of lading. But the Court further held that, rightly construed, the charterparty gave no lien even as against the charterer for the excess of the charterparty freight over the bill of lading freight, the charterparty in terms providing as it did for the demand of that difference by the captain in advance, that is to say, before the ship sailed. It is clearly in reference to the language of the particular charterparty, and not as a statement of general principle, that Lindley L.J. uses the words upon which the appellants so much relied, that "there can be no lien for what is contracted to be paid in advance."

It appears to us that neither of these decisions, which turned in each case upon the construction of the terms of the particular and somewhat peculiar charterparty in regard to the question before the Court, assists the defendants in the present case. So far from there being any reason for inferring in regard to the present charterparty that the lien clause (clause 19), although apparently unlimited, does not, both as against charterer and bill of lading holder, apply to the demurrage which has accrued in the port of loading, and for which, as it was "payable day by day,"—as to which expression I would refer particularly to the opinion of Bramwell B. expressed in *Francesco* v. *Massey* (1),—we agree under the terms of clause 13 the shipowner got in respect of each day on demurrage a vested right of action, it appears to us that, as under this charterparty (clauses 12 and 13) demurrage properly so called can accrue at the port of loading, the true inference is that the grant to the shipowner of a lien for the recovery and payment of all demurrage given by clause 19 is to have its natural application and to be read as covering demurrage at the port of loading, where alone demurrage,

(1) L. R. 8 Ex. 101.

properly so called, can arise. At the port of discharge under this charterparty the only claim for detention of the ship can be a claim for damages. It is quite true that in certain cases demurrage in a charterparty has been treated as covering damages for detention, but that is not its natural or prima facie meaning; see *Gray* v. *Carr* (1); *Lockhart* v. *Falk* (2); *Kish* v. *Cory* (3); and if in the present charterparty there is a lien given (as it is) for "all demurrage," we think that the fact that, according to the terms of the same charterparty, the only port in which demurrage can arise is the port of loading strongly makes for the construction of the whole document which would make the right of lien applicable to such demurrage whether "payable day by day" or not.

The result is that to the extent of the charges not specifically provided for in the charterparty this Court varies the judgment of my brother Bray. But this was stated to be of a trifling amount, and the substantial question raised before us was that of liability to any demurrage in the port of loading, and our order on this appeal will be that the appeal is dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Botterell & Roche.*

(1) L. R. 6 Q. B. 522. (2) (1875) L. R. 10 Ex. 132.
(3) L. R. 10 Q. B. 553.

H. B. H.

1909
Feb. 19, 22, 23, 24; *March* 8.

THE KEPITIGALLA RUBBER ESTATES, LIMITED *v.* THE NATIONAL BANK OF INDIA, LIMITED.

Banker—Cheque—Cheque drawn by Directors on behalf of Company—Forgery—Negligence—Return of Pass-book without Objection—Settled Account.

It is the duty of a customer of a bank in issuing mandates to the bank to take reasonable care so as not to mislead the bank; but, beyond the care which must be taken in or immediately connected with the transaction itself, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants.

The mere fact that a customer of a bank takes his pass-book out of the bank and returns it without objecting to any of the entries contained therein, there being a pencil entry of the balance, does not amount to a settlement of account as between him and the bank in respect of those entries.

The secretary of a company forged the signatures of two of the directors of the company to a number of cheques which purported to have been drawn by the directors on behalf of the company upon the defendants, who were the company's bankers, and the defendants paid the cheques so drawn. The forgeries extended over a period of about two months, during which time neither the bank pass-book nor the cash-book of the company was examined by the directors. In an action by the company against the defendants to recover the amounts so paid:—

Held, upon the facts, that the company was entitled to recover.

Action in the commercial list tried by Bray J. without a jury.

The following, so far as material, were the points of claim:—

1. The plaintiffs claim as money had and received by the defendants to the use of the plaintiffs the sum of 2400*l.*, being moneys of the plaintiffs in the hands of the defendants as the plaintiffs' bankers.

2. The defendants have wrongfully and without the authority of the plaintiffs paid away sums amounting to the said sum of 2400*l.* upon seven forged cheques purporting to be drawn by the plaintiffs upon the defendants and debited the plaintiffs' account with the said sum, and have claimed and claim to retain the like sum out of the plaintiffs' moneys in their hands. The said cheques were drawn without the authority of the plaintiffs by one C. L. Talbot (the secretary of the plaintiff company) in the

name of the plaintiffs as drawers on the defendants, and the said C. L. Talbot forged the names of the directors of the plaintiffs as drawers and stole the cheques, and without the authority of the plaintiffs the amounts of the said cheques were paid by the defendants to or to the order of the said C. L. Talbot, and the defendants have wrongly debited the same to the plaintiffs' account.

3. The plaintiffs further say that the defendants were negligent in paying one of the said cheques, namely, one for 150*l.*, dated December 31, 1907, in that an alteration made therein by the substitution of the word "bearer" for "order" did not purport to be initialled by one of the directors of the plaintiffs who signed the cheque.

The plaintiffs claim 2400*l.* and interest at the rate of 5 per cent. till payment or judgment.

The defendants, in their points of defence, while denying the allegations in the points of claim, alleged that if and in so far as the cheques were forged or stolen or drawn or paid without authority (which was not admitted) the plaintiffs were estopped and precluded from setting up such forgery, stealing, or want of authority in that (*a*) the plaintiffs by their conduct and neglect misled the defendants and caused or permitted them to be misled into paying the cheques; (*b*) the plaintiffs adopted the cheques, and accounts were stated and settled between the plaintiffs and the defendants on the footing that the cheques were properly drawn and paid and properly debited to the plaintiffs' account with the defendants.

The following statement of the facts is taken from the judgment of the learned judge:—"The plaintiffs are a limited company formed about two years before for the purpose of purchasing estates in Ceylon and planting and cultivating thereon tea, rubber, &c. The estates were purchased and were being cultivated and the produce sold. They employed no one in England, except a secretary named Talbot, with whom they made an agreement dated November 19, 1906, which was put in evidence. He was to receive a salary of 250*l.* a year (afterwards increased to 300*l.*), and for that he was to do the work of a secretary, and in addition to supply a registered office for the company, but he

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

was not bound to devote the whole of his time to the business of the company. Talbot at the time he was employed was in the service of Mr. Milne, an accountant, the chairman of the company. He had entered Mr. Milne's service in January, 1906, with an excellent character, and he continued to bear an excellent character down to the date of the forgeries. In order to enable Talbot to perform his agreement with the company he made an arrangement with Mr. Milne under which Mr. Milne provided a room and any necessary assistance from his staff, and he also continued to be in Mr. Milne's service so far as his time was not required for the company's business. At this time he was about twenty-three or twenty-four years of age. The first forgery he committed was in relation to a cheque for 150*l*., dated December 31, 1907, which purported to be payable to Lloyds Bank Limited, where the plaintiffs also kept a banking account. When the plaintiffs had opened their account with the defendants they gave them a written authority to honour cheques drawn by two directors and the secretary, and, for the purpose of enabling the bank to identify their signatures, cards were given on which each of the directors and the secretary wrote their signatures. When cheques were required to be signed at times other than at board meetings it was the practice of the secretary to take the cheques to two of the directors and procure their signatures. At the same time an entry of the cheques was made in a book called the finance-book, and each director when he signed the cheques put his initials in one of two columns in that book opposite the entry of the cheques. In the case of this cheque for 150*l*. the secretary, having filled it up, brought it to Mr. Dick Lauder, one of the directors, on or within a day or two of December 31, 1907, and, after giving him some explanation of the purpose for which the cheque was drawn, Mr. Dick Lauder signed it. At the time he so signed it it was a cheque crossed generally, marked non-negotiable, and payable to Lloyds or order. At the same time Mr. Lauder also initialled the entry in the finance-book, this entry being 'Lloyds Bank transfer to current account 150*l*.' Mr. Lauder had been taken ill some time after this, and his memory had been seriously affected, and he was unable to recollect what explanation the secretary had given. I had no

reason to believe and cannot find that he acted in any way carelessly in signing the cheque. The secretary, who was afterwards prosecuted and pleaded guilty to the forgeries, was not called by either party, and it did not appear, except from what was on the face of the cheque itself, what he had done, but no doubt he had forged the signature of Mr. Milne by means of a rubber stamp belonging to Mr. Milne. He then altered 'order' into 'bearer' and put Mr. Milne's initials to the alteration, also by means of a rubber stamp, and then wrote his own signature and initials. The cheque was afterwards, namely, on January 2, 1908, presented for payment to the defendants through the Union of London and Smiths Bank and paid. The defendants did not call the cashier or give any evidence as to how or under what circumstances it was paid. The alteration of 'order' to 'bearer' did not purport to have been initialled by Mr. Dick Lauder. The defendants were not members of the Bankers' Clearing House. On January 9 an ordinary board meeting of the directors of the plaintiff company was held, at which, according to the usual practice, the finance-book was presented by the secretary. It contained entries of several genuine cheques which had been drawn on the defendants besides the cheque for 150*l.* These were cheques for directors' fees and the secretary's salary. It purported to shew in the proper column the initials of two directors opposite the entry of the cheque for 150*l.* These were the genuine initials of Mr. Dick Lauder and the initials of Mr. Milne forged by means of the rubber stamp. It was the practice at all ordinary meetings for the finance-book to be produced and to be inspected by one of the directors other than the chairman, and at this meeting it was in fact inspected by either Mr. Brett, another director, or Mr. Lauder—it was not certain which. Whoever it was failed to notice anything wrong, and a resolution was passed confirming the drawing of this and the other cheques. The resolution was in these words: 'Cheques drawn since last meeting as per finance-book amounting to 691*l.* were confirmed.' At the same meeting another cheque, a genuine one for 30*l.*, was signed by two directors and entered in the finance-book and in the minutes of the meeting. None of the paid cheques were produced, nor was

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

the pass-book, but the secretary produced a certificate from the defendant bank of the amount standing to credit of the company. No calculation was made, nor could be effectually made without the pass-book, to see whether the amount was correct, and nothing wrong was noticed. The chairman, Mr. Milne, who was called as a witness by the plaintiffs, explained that the object of obtaining the certificate of the balance was in order that they might see what moneys they had to meet their acceptances coming due and other liabilities. The cash-book was not produced. It was not clear whether the cheque for 30*l.* was signed while in the cheque-book or after it had been torn out. At all events nothing wrong was noticed with regard to the cheque-book. Some evidence was given on behalf of the defendants by two well-known accountants that it was the ordinary course in the city of London to have the cash-book and the pass-book produced at every board meeting of a company, but I am not satisfied that there was any carelessness on the part of any of the directors or default in the duty which they owed to the shareholders in the conduct of the business of the company at this meeting, though, of course, it would have been possible to have taken greater precautions which would have resulted in the discovery of the forgery.

"The next meeting of the directors was held on February 6. It was a special meeting called by telephone at two hours' notice to consider an important and urgent matter, namely, the proposed absence of a Mr. Holland, their manager in Ceylon. No ordinary business was conducted, except the passing of some transfers and the signing and issuing of some share certificates. No books at all were produced. By this time the secretary had forged two more cheques, namely, one for 500*l.*, dated January 29, and made payable to himself or order. In that case he had forged the signature of Mr. H. W. Brett, a director, in ordinary writing, and the signature of Mr. Milne by means of the rubber stamp. This cheque was paid by the defendants on January 30. Another cheque for 500*l.* was similarly forged and paid by the defendants on February 5. There was nothing to excite the suspicion of the directors at their meeting on February 6, and I am unable to find any carelessness in their conduct on that occasion. I should

not have expected that at a meeting called at such short notice for a very special object any books would be called for and produced. On February 6, probably after the meeting, the secretary forged another cheque for 200*l.*, payable to himself or order, which was paid by the defendants on the 11th. On the 8th another for 300*l.*, payable to the Mercantile Bank of London, or order, altered to 'bearer,' was forged by the secretary, and was paid by the defendants on the 11th. On the 16th another, payable to C. Talbot (salary account) or order, was forged, and was paid on the 20th, and on March 2 another for 250*l.*, payable to the Rubber Investment Company, which was paid on March 3. On this day at a committee meeting of the Rubber Investment Company, a company of which Talbot was also secretary, the forgeries were discovered by Mr. Milne. Talbot confessed to the forgeries and produced the forged cheques from his pocket and was given into custody. He was sentenced to imprisonment for fifteen months only on account of his previous good character.

"The rubber stamps with Mr. Milne's signature and initials had been provided for him by another company, of which he had been a director some three or four years before, in order that they might be used for signatures to share certificates. He kept them in a small box provided for the purpose with a Bramah lock, of which he had one key only. This box was kept by Gregg, his cashier (who was called as a witness by the plaintiffs), in a locked drawer in the room where he sat, the key of which was kept by him. The stamps were used occasionally by Gregg on Saturdays (when Mr. Milne was away) to put Mr. Milne's signature to letters which he had dictated the previous evening, but which had not been copied in time for signature that evening. They were also used for signing share certificates of the plaintiff company. On these latter occasions Gregg handed the stamps to Talbot for the purpose, and received them back from him the same day. Between February 10 and February 19 Mr. Milne was away ill, and Gregg was in Scotland on business, and during that period Talbot had the key of the drawer and the box. It was not shewn how or when Talbot had obtained the stamps. As far as I could see, every care was taken of these stamps, both by Mr. Milne and Gregg. The box and

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

stamps were the property of Mr. Milne and not of the plaintiff company, and Gregg was not a servant of the plaintiff company.

"As regards the pass-book, the defendants called two of their ledger clerks. They proved that whenever the pass-book was called for by the customer they made a pencil entry of "p. b." opposite the last entry in the ledger. This shewed that the pass-book had been given to the customer at some date between the date of that entry and the next. There was nothing to shew when the pass-book was returned to the bank. When they gave out the pass-book the items were not cast up, but there was a pencil entry in the pass-book of the balance. From the pencil entries in the defendants' ledger it appeared that the pass-book had been taken out on January 3, and also on some dates between February 1 and February 5, between February 6 and February 11, between February 22 and March 3, and on March 4. On the last occasion it was taken out by the direction of the chairman, who had then discovered the frauds. There was no evidence to shew that the pass-book had ever been in the plaintiffs' office at all during the time between December 31 and March 4, and the plaintiffs suggested that Talbot had called for it in order to abstract the forged cheques, which when paid would be put by the defendants into the pocket of the pass-book. It was clear that none of the directors had seen it between the time that the first forged cheque was paid and March 3, when the forgery was discovered. I think it is most probable that the plaintiffs' suggestion is correct. It would be quite consistent with the evidence that Talbot should have placed the pass-book in the box provided for pass-books as soon as he had abstracted the forged cheques without ever having taken the pass-book out of the bank's premises. None of the bank's cashiers or officers were called to shew that they had been misled into paying any of the cheques by any conduct of the plaintiffs, nor to shew what induced them to pay the cheques, nor whether they made any inquiries of the ledger clerks or any one else as to whether the pass-book had been taken out, or as to whether the customer had made any objection to the payment of any of the earlier forged cheques. Probably the cashier paid the cheques because the signatures looked like the signatures of the directors.

"With regard to the payment of the cheque for 150*l.*, where Mr. Lauder had not initialled the alteration from 'order' to 'bearer,' the accountants stated that it was usual for bankers to pay if two out of the three initialled the alteration. It seemed to me, however, that they would do this at their own risk. If Mr. Lauder never initialled or authorized the alteration the payment of the cheque by the bank would not be authorized. But, having regard to the opinion I have formed on other points, I do not think this was of any importance."

J. A. Simon, K.C., and *Maurice Hill*, for the plaintiffs. The defendants in paying the forged cheques acted without authority. They cannot therefore charge the plaintiffs with the sums so paid, unless they can shew that the plaintiffs by their conduct caused them to pay the cheques: *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (1) There was no such conduct on the part of the plaintiffs here, and therefore they are not estopped from setting up the invalidity of the cheques. The defendants are accordingly liable to the plaintiffs for the sums claimed.

Scrutton, K.C., and *Norman Craig*, for the defendants. It is the duty of a customer towards his banker to use reasonable care in the issuing of a mandate to the banker: *Young* v. *Grote* (2), as explained in *Scholfield* v. *Earl of Londesborough* (3); *Halifax Union* v. *Wheelwright* (4); *Bank of England* v. *Vagliano* (5); *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (6) It is also the duty of a customer to his banker to take reasonable care in the carrying out of his business relating to the issuing of mandates. The mandate is a continuing mandate, namely, to pay the sums for which cheques are drawn from time to time, and care must be taken during the whole time. The duty of the customer is to take reasonable care to prevent the banker from being misled on each occasion. The observations of the learned Law Lords in *Bank of England* v. *Vagliano* (7) support this view. Further, if the customer delegates those duties to another person,

(1) (1906) 11 Com. Cas. 255.
(2) (1827) 4 Bing. 253.
(3) [1896] A. C. 514.
(4) (1875) L. R. 10 Ex. 183.
(5) [1891] A. C. 107.
(6) 11 Com. Cas. 255, at p. 266.
(7) [1891] A. C. 107, at pp. 115, 116, 123, 124, 133, 159.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

he must take reasonable care to supervise the execution of those duties by that person so as to prevent the delegation from being abused: *Leather Manufacturers' Bank* v. *Morgan.* (1) In the present case the directors who signed the cheques acted negligently in signing them, and the rubber stamp bearing the signature of the chairman of the plaintiff company was negligently kept, and thus the defendants were misled into paying the cheques. There was no proper supervision of the duties of the secretary.

Next, the taking out of the pass-book from the bank and its return by the plaintiffs without objection being taken to the entries therein relating to the forged cheques, and with the balance pencilled in, amounted to a settlement of account between the plaintiffs and the defendants. A customer is bound to know the contents of his pass-book: per Lord Halsbury in *Bank of England* v. *Vagliano.* (2) The customer is bound to examine the entries in the pass-book when he receives it, and to report any errors in it, and if he fails to do so, and the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shewn by the pass-book: *Leather Manufacturers' Bank* v. *Morgan.* (3) The observations of Lord Esher in *Chatterton* v. *London and County Bank* (4) to the effect that a customer has no duty to examine his pass-book ought not to be followed. If the directors of the plaintiff company had properly examined the books, including the cash-book and the pass-book, they would have discovered the forgeries. The plaintiffs are therefore estopped from denying the correctness of the balance shewn in the pass-book, and they are not entitled to recover the amounts claimed. At any rate the plaintiffs are estopped from saying that the cheque for 150*l.* was a forgery, because on January 9 the directors confirmed that cheque.

J. A. Simon, K.C., in reply. The principle is that the banker has entered into a contract with his customer not to part with the latter's money until he receives a mandate from the

(1) (1886) 117 U. S. Rep. 96, at p. 116.
(2) [1891] A. C. 107, at p. 116.
(3) 117 U. S. Rep. 96.
(4) (1890) reported in the *Miller* of November 3, 1890, and referred to at length in Paget on the Law of Banking, 2nd ed., pp. 156—160.

customer to pay it, or some part of it, away. The banker must shew a mandate, which he can only do by producing a valid cheque drawn by the customer, or he may give evidence of such conduct on the part of the customer as will estop him from denying the mandate. Negligence only comes in to prove estoppel. The customer owes a duty to his banker to take reasonable care in giving a mandate: *Young* v. *Grote* (1); *Halifax Union* v. *Wheelwright* (2); *Scholfield* v. *Earl of Londesborough.* (3) But the banker must shew that the negligence of the customer in giving the mandate misled him into paying the cheques. The negligence must be in the transaction itself; the mere negligent keeping of a seal or of a rubber stamp is not sufficient: *Bank of Ireland* v. *Trustees of Evans' Charities.* (4) There must be some voluntary act of the customer which misleads the banker and causes him to pay the cheques. In the present case there was no mandate in fact given by the plaintiffs to the defendants to pay these cheques. The signatures to the cheques were forged. Therefore no question of negligence in issuing the mandate arises. Even if it did, there was no such negligence here as to prevent the plaintiffs from recovering. *Bank of England* v. *Vagliano* (5) was a case relating to bills of exchange, and the acceptances were genuine acceptances. The plaintiffs there put forward the bills as genuine, and the true principle of that decision is that the acceptor warrants the genuineness of the drawer's signature. The Bank were thus in that case misled into paying the acceptances. That case, therefore, is not against the plaintiffs' contention.

With regard to the pass-book, the mere fact of taking the pass-book out of the bank and returning it without objection does not amount to a settlement of account. In *Vagliano* v. *Bank of England* (6), in the Court of Appeal, Bowen L.J., in delivering the judgment of the majority of the Court (Cotton, Lindley, Bowen, Fry, and Lopes L.JJ.), said that "there was no evidence

(1) 4 Bing. 253.
(2) L. R. 10 Ex. 183.
(3) [1896] A. C. 514. See upon this point *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559.
(4) (1855) 5 H. L. C. 389.
(5) [1891] A. C. 107.
(6) (1889) 23 Q. B. D. 243, at p. 263.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

to shew what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass-book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the Bank or negligence on his part." That proposition was not affected by the reversal of the decision in the House of Lords. There is no such evidence in the present case. On the contrary, the evidence shews that each half-year the defendants sent a form to their customers to sign acknowledging the correctness of the half-yearly balance. That distinctly shews that the defendants did not look upon the return of the pass-book without objection as amounting to a settlement of account, and no such inference as that suggested by the defendants can be drawn from it. There was no duty on the directors to examine the entries in the pass-book: *Ghatterton* v. *London and County Bank.* (1) There was no neglect of duty on the part of the directors of the plaintiff company. Further, there is no evidence to shew that the pass-book was ever outside the bank premises during the material period. It is quite consistent with the evidence that the secretary went to the bank and, having got the pass-book, took the forged cheques out of it, and returned the book without taking it away. The proximate cause of the loss was the act of the defendants in paying the cheques without having a mandate to that effect.

Cur. adv. vult.

March 8. BRAY J. read the following judgment:—This is an action brought by the Kepitigalla Rubber Estates, Limited, against the National Bank of India to recover 2400*l.*, the amount of seven cheques with which the defendants had debited the plaintiffs. The plaintiffs kept an account with the defendants as their bankers, and contended that the defendants had improperly debited their account with these seven cheques on the ground that the signatures of the directors were forged. The defendants disputed the forgeries, and in addition set up two defences—(*a*) that the plaintiffs had by their conduct and neglect

(1) See Paget on the Law of Banking, 2nd ed., pp. 156—160.

misled the defendants and caused or permitted them to be misled into paying the cheques; and (*b*) that the plaintiffs adopted the cheques, and that accounts were stated and settled on the footing that the cheques were properly debited.

The facts proved are as follows: [The learned judge stated the facts as set out above, and proceeded.] Having now stated the facts, I will address myself to the defendants' contentions. It is, of course, clear that the plaintiffs never authorized or directed the payment of any of the cheques, and that the whole of the proceeds had been taken by Talbot. It is true that on January 9 they passed a resolution confirming the drawing of the cheque for 150*l.*, but this resolution was never communicated to the defendants, and it was passed in ignorance of the fact that the cheque was forged, and that Talbot had cashed it, received the proceeds, and put them into his pocket. It was, therefore, for the defendants to justify the payment.

They contended, first, that it was the duty of the plaintiffs to them, as their bankers and as part of the contract between them, (*a*) to use reasonable care in the issuing of mandates to the defendants, and (*b*) in the carrying out of their business relating to the issuing of mandates, and if they delegated these duties to another, they must use reasonable care to supervise the execution of the duties and to prevent the delegation from being abused. I think the cases established the first part of this proposition. There is the case of *Halifax Union* v. *Wheelwright*. (1) The arbitrator had stated a special case, and in that case he had stated that a person in the service of the plaintiffs, who was employed by them to fill up orders for signature, drew a number of orders in such a way that the amounts could be increased, and after signature he increased the amounts, which were paid by the treasurer's, that is the defendant's, clerk; and, after stating these facts, he expressly found that the payment of the excess was due solely to the fact that they were misled by want of proper caution on the part of the plaintiffs and their clerk in signing the orders fraudulently prepared for their signature. In other words, the arbitrator found negligent drawing of the drafts by which the defendant was misled, and

(1) L. R. 10 Ex. 183.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

Bray J.

the Court held that a man could not complain of the consequence of his own default against a person who was misled by that default without any fault of his own. I think *Young* v. *Grote* (1), as construed by the learned Lords who gave judgment in *Scholfield* v. *Earl of Londesborough* (2), is also an authority to the same effect; but the strongest authority is *Bank of England* v. *Vagliano* (3), where a majority of the learned Lords held that the Bank were entitled to debit Vagliano with the amount of certain bills, the payee's indorsement of which was forged, because they had been misled by acts of Vagliano immediately connected with the transaction. I shall have to consider this case further presently.

I should come to the same conclusion apart from authority. It seems to me to be clearly the duty of a person giving a mandate to take reasonable care that he does not mislead the person to whom the mandate is given. That, as has been pointed out, is the duty as between a principal and his agent: *Ireland* v. *Livingston* (4); and although the relationship between a customer and his banker is not that of principal and agent, the same considerations would seem to apply. The customer is asking the bank to do something. Surely he should take care that his request is made in such a way as not to mislead his banker. Now, assuming this to be the duty, has it been broken in this case? The plaintiffs gave a clear instruction to the defendants to honour only cheques signed by two directors and their secretary, and they gave the bank genuine signatures of all the directors and the secretary to enable the bank to see if the signatures on the cheques were genuine. So far there was clearly no want of care. It is not uncommon to direct bankers to pay on the signature of one director and the secretary. Making the signature of two directors necessary is a strong additional security. What else have the directors done in relation to these cheques? Nothing, except that in the case of the first cheque for 150*l.* one director, Mr. Lauder, signed the cheque, but one director and the secretary could not give a mandate, and Mr. Lauder's mandate was to pay Lloyds Bank

(1) 4 Bing. 253.
(2) [1896] A. C. 514.
(3) [1891] A. C. 107.
(4) (1872) L. R. 5 H. L. 395.

or order. In truth, the plaintiffs have done no acts whatever in relation to the issuing of the mandate, and, further, there is no evidence to shew that the bank were misled by any conduct on their part. If the duty is only to take reasonable care in issuing a mandate it is impossible for me to find a breach of that duty.

Therefore it is that the defendants go further and say that there is a duty "to use reasonable care in the carrying out of their business relating to the issuing of mandates." This is a very vague statement of the duty. What is meant, I suppose, is that, beyond the care which must be taken in the transaction itself, a customer must, in the course of carrying on his business, take reasonable precautions to prevent his servants from forging his signature, or, if the customer be a company, the directors must take reasonable precautions to prevent the company's servants from forging their signatures. Now is there any authority for this proposition? I can find none. *Halifax Union* v. *Wheelwright* (1) and *Young* v. *Grote* (2), as explained in *Scholfield* v. *Earl of Londesborough* (3), are clearly no authorities, because there the breach of duty was in connection with the drawing of the order or cheque. Most reliance was placed by the defendants on *Bank of England* v. *Vagliano*. (4) It is necessary, therefore, to examine the judgments in that case. Lord Halsbury's decision seems to me to be based on this, that Vagliano by his own acts in relation to the bills themselves misled the Bank. Two acts were mainly relied on—first, that Vagliano himself accepted the bills as genuine bills when in reality they were not bills at all; second, that by a separate writing, namely, the letter of advice, he told the Bank that the bills of exchange were coming due and would have to be paid out of his account, when in fact no such bills of exchange existed. But the learned Lord expressly states on page 115 that he does not dispute that the carelessness of the customer or the neglect of the customer to take precautions unconnected with the act itself cannot be put forward by the banker as justifying his own default. Then follows the passage on the top of page 116 which was much relied on by Mr. Scrutton. The object of the statements made in that passage was to shew

(1) L. R. 10 Ex. 183.
(2) 4 Bing. 253.
(3) [1896] A. C. 514.
(4) [1891] A. C. 107.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

Bray J.

that in that case the default was not unconnected with the act or transaction. Those statements shew that most clearly when it is remembered that the acts which misled the Bank were the acceptance of the bills and the sending of the advice notes by or with the genuine authority of Vagliano himself. There are no circumstances in the present case that have any resemblance to the circumstances there stated, except possibly the suggestion that Vagliano was bound to know the contents of his own pass-book, but here also the circumstances are quite different in the present case. In that case there were forty-three forged bills extending over a period from February to October. The pass-book was, in the regular course of business, sent to the plaintiffs half-yearly, balanced up, and was sent during this period with all the entries of debit in respect of these bills and with the forged bills as vouchers, and it was returned by the plaintiffs without objection, whereas in this case there was no half-yearly balance during the period of January and February, and no evidence to shew that the pass-book ever reached the company's office. I pass next to Lord Selborne's judgment. I think he bases his decision substantially on the same ground as Lord Halsbury, namely, that Vagliano had himself misled the Bank upon a material point. Lord Watson, at the bottom of page 133, gives as the ground of his decision that the belief that the bills were genuine on which the Bank acted was induced and warranted by Vagliano's representations. Lord Bramwell, on page 135, emphatically negatives Mr. Scrutton's contention when he says, "I think it is necessary for the defendants to shew that the plaintiffs caused them (the defendants) to pay these bills as they did. It is not enough to shew that they gave occasion to their doing so—that different conduct would have prevented the fraud and the payment by the defendants." It seems to me that so far from *Bank of England* v. *Vagliano* (1) being in favour of Mr. Scrutton's contention, it is distinctly against it. I have already considered the cases of *Halifax Union* v. *Wheelwright* (2) and *Young* v. *Grote*. (3) They support the first contention that there is a duty to use reasonable care in issuing the mandate, but no further.

(1) [1891] A. C. 107. (2) L. R. 10 Ex. 183.
(3) 4 Bing. 253.

There are other authorities which are also strongly against Mr. Scrutton's contention. They are *Swan* v. *North British Australasian Co.* (1), *Bank of Ireland* v. *Trustees of Evans' Charities* (2), *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (3), and, finally, *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (4) Without referring in detail to these cases, they can be summed up by saying that they lay down most clearly that the negligence must be in or immediately connected with the transaction itself and must have been the proximate cause of the loss. It is true that the first three of these cases are not cases between bankers and their customers, but they have always been treated as analogous. The last case, however, is a case of banker and customer and resembles the present case in many ways, and it would be quite sufficient for me to say that I am bound by that decision.

I think Mr. Scrutton's contention equally fails when it is considered apart from authority. It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to this case, can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with

(1) (1863) 2 H. & C. 175.
(2) 5 H. L. C. 389.
(3) (1887) 21 Q. B. D. 160.
(4) 11 Com. Cas. 255.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

Bray J.

the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.

Assuming, however, that there was a duty on the part of the company to take reasonable precautions to prevent frauds of this kind, have the company made default? I have dealt with this in my statement of facts. I cannot find that they have made default. They have not taken all the precautions that were possible and probably not all that a good many companies do take, but I think they took reasonable precautions. Talbot was a man with the best of characters. There is no evidence of the slightest departure from honesty up to December 31, 1907. According to the minute-book, the directors had the pass-book before them four times in the previous half-year. The account was operated on very little. Detection must have come very soon. It was a most improbable thing for a secretary to successfully forge the signatures of two directors. They might well have thought that it was exceedingly unlikely that the bank would have cashed the succession of cheques which they did without any inquiry. The whole thing was so very improbable that I do not think that it would have occurred to reasonably prudent directors to do more than they did. I do not inquire whether the bank officials were careless. It is for them to say what precautions they should take in their own interest. They are responsible if they choose to cash forged cheques, unless they can shew that they have been misled by their customer. In my opinion any defence founded on the conduct of the plaintiffs fails.

Two more points were raised by the defendants—(1.) that the plaintiffs had confirmed the acts of Talbot in relation to the cheque for 150*l.*; (2.) that the return of the pass-book without objection constituted a settled account. As I have stated, the directors of the plaintiff company on January 9 passed a resolution that the cheques drawn since the last meeting as per finance-book amounting to 691*l.* (which included the cheque for 150*l.*) were confirmed. This resolution was never communicated to the bank, nor did they ever hear of it. They were not misled by it

and did not act upon it. As an act of ratification it fails, because the directors were in ignorance of the facts. Of course if they had known the facts they would not have passed the resolution. Mr. Dick Lauder did not know that, wholly unauthorized by him, the word "order" had been altered to "bearer," and he believed that Mr. Milne's initials in the finance-book were genuine. Mr. Brett, if he was the person who looked through the finance-book, also believed that Mr. Milne's initials were genuine, and Mr. Milne was in entire ignorance of the fraud, and no doubt of the cheque also, and relied on the inspection by one of the directors. The object of the resolution was not so much to ratify the acts of the secretary as to ratify what the directors thought had been the drawing of the cheques by the two directors. This defence also fails.

The last raises a more important point, though I should add that it was not seriously pressed before me. It is this: that when a pass-book is taken out of the bank by the customer or some clerk of his and returned without objection there is a settled account between the bank and the customer by which both are bound. I know of no authority in this country for this proposition. The cases on the subject will be found in Sir John Paget's book on the Law of Banking, chapter 12, "The Pass-Book," 2nd ed., p. 150. One of the cases there referred to, *Chatterton* v. *London and County Bank*, on page 156, appears to be reported only in the *Miller* newspaper of November 3, 1890. Sir John Paget has been good enough to let me see that report. That is not, of course, an authorized report, but one cannot read it without being impressed by the fact that it must have correctly stated Lord Esher's language. At all events the language used seems very good sense. The new trial of the case was reported in *The Times* of January 21, 1891, as well as in the *Miller* of February 2, 1891, and the observations of Mathew J. as given on page 159 of Sir John Paget's book are most pertinent and, as it seems to me, most sound. The point was strenuously argued in *Vagliano* v. *Bank of England* (1) in all the Courts. In the Court of Appeal (2) Bowen L.J., delivering the judgment of five

(1) 22 Q. B. D. 103; 23 Q. B. D. 243; [1891] A. C. 107.

(2) 23 Q. B. D. at p. 263.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED v. NATIONAL BANK OF INDIA, LIMITED.

Bray J.

Lords Justices, says: "There is another point to be considered. The plaintiff from time to time received from the Bank his pass-book, with entries debiting the payments made, for which the Bank sent the bills as vouchers, which were retained by the plaintiff when he returned without objection the pass-books. It was contended that this was a settlement of account between him and the Bank, and that he had been guilty of such negligence with respect to the examination of the vouchers as would have prevented him from being relieved from this settlement of account. But there was no evidence to shew what, as between a customer and his banker, is the implied contract as to the settlement of account by such a dealing with the pass-book, or that, having regard to the ordinary course of dealing between a banker and his customers, the plaintiff had done anything which can be considered a neglect of his duty to the Bank or negligence on his part." It will be found that there is nothing in the judgments in the House of Lords casting any doubt on this statement of the law. So far from there having been any evidence before me such as Bowen L.J. refers to, there was evidence to shew that, when the defendants desired a settlement of the account, they took steps for that purpose. Every half-year the defendants sent a form for their customers to sign acknowledging the correctness of the balance. They sent such a form to the plaintiffs on December 31, 1907, and it was acknowledged as correct. They sent a similar form on June 30, 1908, with a balance based on the assumption that the forged cheques were properly debited to the plaintiffs, and the plaintiffs refused to acknowledge it as correct. I was referred to an American case, *Leather Manufacturers' Bank* v. *Morgan*. (1) I do not think it necessary to say more about that case than that the facts as stated in paragraph 5 on page 100 are quite sufficient to distinguish it from the present case, and that it has never been acknowledged by any Court or judge in this country as correctly stating our law. Lastly there is the case of *Lewes Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.* (2), to which I have already referred. In that case it appears that the pass-book was seen at least once by the directors when it contained entries of three of

(1) 117 U. S. Rep. 96. (2) 11 Com. Cas. 255.

the forged cheques, and it was returned without objection; but this was held to be no answer to the plaintiffs' claim.

Apart from authority one has only to look at the facts of this case to see how absurd it would be to hold that the taking out of the pass-book and its return constituted a settled account. It would mean this, that a secretary of a company, by going to the bank for his own purposes in order to prevent the discovery of his own fraud, and without any knowledge on the part of any of the directors, and getting the pass-book (with a pencil entry in it of the balance), can bind the company for all purposes.

In my opinion all the defences set up by the defendants fail, and there must be judgment for the plaintiffs for the amount claimed with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Warren, Murton & Miller.*
Solicitors for defendants: *Sanderson, Adkin, Lee & Eddis.*

W. F. B.

1909

KEPITIGALLA RUBBER ESTATES, LIMITED *v.* NATIONAL BANK OF INDIA, LIMITED.

Bray J.

JONES & CO. *v.* COVENTRY.

1909 *July* 19 20.

Practice—Attachment of Debts—Garnishee Order—Retired Pay of Officer in Army—Pension due but not paid—Bank crediting Amount to Customer—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.

The defendant, who was a retired officer of the Army, was entitled to retired pay in respect of past services. The retired pay was payable quarterly, and on each occasion a form of pay warrant had to be filled in and signed by the defendant, which contained a declaration that he was entitled to retired pay at a certain rate for the last quarter, followed by the words "Received of H. M. Paymaster-General this day of , 190 , the sum of pounds, being the amount of retired pay due for the period stated in the above declaration." At the end of the form were the words "This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination." The defendant opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into this account, and he drew against this account by cheques in the ordinary way. On January 1, 1909, a sum of 6*l.* 13*s.* 8*d.* was standing to his credit at the bank, this sum being the balance of the retired pay previously received by him from the Paymaster-General, and on that day a pay warrant in the form given above, duly filled in and signed, for the sum of 17*l.* 12*s.* 6*d.*, being the

1909

JONES & CO. v. COVENTRY.

amount of his retired pay due to him on that day for the preceding quarter, was handed by him to the bank for collection, and the bank at once credited his account with the amount. On the same day, after the amount had been so credited, a garnishee order nisi was served on the bank, at the instance of a judgment creditor of the defendant, attaching all debts owing or accruing due from the bank to the defendant to answer the judgment debt. The pay warrant was paid by the Paymaster-General on January 7. The defendant contended that both the above sums were protected from execution by s. 141 of the Army Act, 1881:—

Held, that the 6*l.* 13*s.* 8*d.* had lost its character of retired pay as it had been received from the Paymaster-General at the time when the garnishee order was served, and was therefore liable to attachment; and that the 17*l.* 12*s.* 6*d.* was not liable to attachment, notwithstanding that the amount had been placed by the bank to the defendant's credit, as it retained its character of retired pay until it had been paid by the Paymaster-General.

APPEAL from an order of Master Archibald upon the trial of an issue.

The plaintiffs in 1905 recovered judgment against the defendant for a sum of money, of which 101*l.* 13*s.* 5*d.* remained due and payable.

The defendant, who was a retired officer of His Majesty's Army, not liable to be called upon to serve again, was entitled to retired pay to the amount of 200*l.* a year. He opened an account at the Birmingham branch of the National Provincial Bank of England for the sole purpose of collecting his retired pay, the warrants for which had to be presented to the Paymaster-General by a London banker. The bank, through their head office in London, collected the retired pay from time to time and placed the amount thereof to his credit. No other money except his retired pay was placed to his credit at this account. The defendant drew against this account by means of cheques in the ordinary way.

Retired pay is due quarterly on January 1, April 1, July 1, and October 1 in each year (though in certain circumstances an advance can be obtained in respect of the current quarter's pay), and the officer who is entitled thereto has to fill in a form of pay warrant headed "Army—Retired Pay," of which the following, so far as material, is a copy:—

"I do solemnly and sincerely declare that I am entitled

to retired pay at the rate of per as a of the regiment for the quarter ended the last day of 190 , and that during that period I have not held any place or employment of profit, civil or military, in any department of His Majesty's service, nor in the Colonies or possessions of His Majesty beyond the seas, nor under any other Government except *** (see below) *from which an abatement of £ has been made.*

Declared and subscribed before me, at
this day of 190 .

The person authorized to attest is to sign here and describe fully the capacity in which he acts, stating his official address or place of business. (See back of form.) _____

The officer to sign his name here _____

Permanent residence _____

Near the post town of _____

In the county of _____

*** Describe the employment, the date of its commencement, and the annual salary and emoluments thereof. If an abatement is made from the salary and emoluments, the amount per annum or the percentage is to be stated, but if the officer holds no employment the words in italics are to be lined out.

RECEIVED of H. M. Paymaster-General, this day of 190 , the sum of pounds, being the amount of retired pay due for the period stated in the above declaration, *less the advance already received.*†

Full . .	£	,,	,,
Tax . .	£	,,	,,
Net . .	£	,,	,,

Exd. Signature

† The words in italics may be lined out when no advance has been received.

. . . . . .

Under the Act 44 & 45 Vict. c. 58, s. 141, this allowance cannot be assigned as security for a loan of money.

1909

JONES & CO. v. COVENTRY.

This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination."

Upon the back of the form a list was given of the persons before whom the declaration might be subscribed.

On January 1, 1909, a sum of 6*l.* 13*s.* 8*d.* was standing to the credit of the defendant's account at the Birmingham branch of the bank, being the balance of payments of retired pay previously made to him. Upon the same day the defendant handed to the Birmingham branch of the bank a pay warrant in the form given above, signed by him and filled in for the sum of 17*l.* 12*s.* 6*d.*, being the balance of the retired pay due to him for the preceding quarter, and the bank at once credited his account with this amount by entering it to his credit in their books and in his pass-book.

The bank then sent the warrant to their head office in London, who presented it at the Paymaster-General's office, and the warrant was paid on January 7.

On January 1, after the above-mentioned sum of 17*l.* 12*s.* 6*d.* had been placed to the defendant's credit at the bank, a garnishee order nisi, which had been obtained by the plaintiffs, was served upon the bank attaching all debts owing or accruing due from the bank to the defendant to answer the judgment debt due from the defendant to the plaintiffs.

Upon the garnishee order nisi coming on for hearing, an issue was ordered to be tried by a Master of the Supreme Court as to whether the sum of 6*l.* 13*s.* 8*d.* or the sum of 24*l.* 6*s.* 2*d.* (this latter sum being the amount of the two sums of 6*l.* 13*s.* 8*d.* and 17*l.* 12*s.* 6*d.*, which were then standing to the credit of the defendant's account at the bank) was liable to attachment on January 1, 1909, the date of the service of the garnishee order nisi. The issue, in which the judgment creditors were plaintiffs and the judgment debtor was defendant, was tried before Master Archibald, who held that "when once the money reaches the officer's banking account it ceases to be impressed with the character of pension; the only concern of Parliament being to see that the money reaches the officer, and is not intercepted on its way to his hands or account." He decided that the sum of

24*l.* 6*s.* 2*d.* was liable to attachment at the time when the garnishee order nisi was served and ordered the bank to pay that sum to the plaintiffs.

The defendant appealed.

H. A. McCardie, for the defendant. The two sums of 6*l.* 13*s.* 8*d.* and 17*l.* 12*s.* 6*d.* are protected from attachment by s. 141 of the Army Act, 1881 (1), because retired pay, being thereby made inalienable, cannot be taken in execution: *Lucas* v. *Harris*. (2) As to the sum of 6*l.* 13*s.* 8*d.*, no sum of money can be taken in execution so long as it can be identified as pension, even though it may have been paid to the person entitled to the pension or into his account at his bank. If he receives the amount of the pension in notes or gold and keeps it separate from his other moneys it cannot be taken in execution. If a pensioner does not draw his pension for some time, but allows it to accumulate in the hands of the Paymaster-General, it could not be successfully contended that the money in the Paymaster-General's hands could be attached to answer a judgment debt. There is no difference in principle between that case and the case where the pensioner receives the pension and allows it to accumulate either by keeping it in a box by itself or by placing it to a separate account at a bank. So long as it retains its character of pension, and can be identified as such, it cannot be taken in execution. In *Crowe* v. *Price* (3) the officer, who was entitled to retired pay, became bankrupt, and under an order in bankruptcy a certain sum per month out of the retired pay was paid by the Paymaster-General to the trustee in bankruptcy, and upon the annulment of the bankruptcy the trustee had in his hands a sum of money representing the balance of these

(1) 44 & 45 Vict. c. 58, s. 141: "Every assignment of, and every charge on, and every agreement to assign or charge, any deferred pay or military reward payable to any officer or soldier of any of Her Majesty's forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a Royal Warrant for the benefit of the family of the person entitled thereto, or as may be authorised by any Act for the time being in force, be void."

(2) (1886) 18 Q. B. D. 127.

(3) (1889) 22 Q. B. D. 429.

1909

JONES & CO. v. COVENTRY.

payments in respect of pension. It was held by the Court of Appeal that a judgment creditor of the officer was not entitled to the appointment of a receiver in respect of this sum of money because it remained pension though the Paymaster-General had parted with it. There are, no doubt, observations of the judges in that case which seem to suggest that it might be different if the retired pay had been received by the officer, but those observations are mere dicta and ought not to be followed. The sum of 6*l.* 13*s.* 8*d.* therefore due from the bank to the defendant cannot be attached.

Next with regard to the sum of 17*l.* 12*s.* 6*d.*, it is clear that, as that sum had not been received from the Paymaster General by the bank on behalf of the defendant at the time when the garnishee order nisi was served, it still retained its character of pension, not having been reduced into possession, and cannot be attached. The fact that the bank provisionally credited the defendant's account with the amount did not create a debt due from the bank to the defendant which could be attached under the garnishee order. Even if a debt could be said to be created, it was by an assignment of the pension to the bank, which is prohibited by s. 141 of the Army Act, 1881. The Master misapplied the reasoning of the decision in *Capital and Counties Bank* v. *Gordon* (1), where it was said that a banker who credits his customer with the face value of a cheque before it is collected becomes the holder for value of the cheque. That was the case of a cheque, which is a negotiable instrument, and which therefore stands in a different position from a retired pay warrant, which is a mere receipt. Until it is paid by the Paymaster-General the money remains retired pay and cannot be attached.

W. H. Moresby, for the plaintiffs, was only called upon as regards the sum of 17*l.* 12*s.* 6*d.* Sect. 141 of the Army Act, 1881, prohibits an assignment of or charge on the pension payable to any officer or soldier. It does not forbid the negotiation of the pay warrant. At common law a pension for past services was alienable in any way. It might have been assigned or charged, or a negotiable instrument might have been given in respect of it. Sect. 141 only prohibits an assignment or a charge. It

(1) [1903] A. C. 240, at p. 245.

does not prohibit negotiation. The pay warrant is a negotiable instrument. The warrant upon its face draws a distinction between assignment and negotiation, because it expressly points out that s. 141 of the Army Act, 1881, prohibits an assignment of the pension as security for a loan, while at the same time it says that the warrant must be presented for payment by a London banker, but that it may be negotiated in the country or abroad. For the benefit of the officer who may live abroad the document is allowed to be negotiated, otherwise the officer might be kept out of his money for some time. The section, therefore, does not forbid the negotiation of the warrant for full value. An assignment is different from negotiation. An assignee takes subject to all equities; a person to whom a negotiable instrument is transferred for value and who has no notice of any defect in the title of the transferor does not. As soon as the bank received the warrant and placed the full amount thereof to the defendant's credit they became holders for value of the warrant: *Capital and Counties Bank* v. *Gordon*. (1) The defendant thereupon ceased to have any interest in the document, the whole interest in it passing to the bank. Each warrant or receipt, when filled up and signed, becomes the documentary evidence of the contract with the Crown for the payment of the pension and can be negotiated. The money when placed to the defendant's credit ceased to have the character of pension and was liable to attachment in the same way as the other moneys standing to his credit at the bank.

Further, the bank, by giving the defendant credit in his pass-book for the amount of the warrant, are estopped from saying that they do not owe this sum of money to the defendant: *Akrokerri (Atlantic) Mines, Ld.* v. *Economic Bank*. (2) Therefore, apart from any question of negotiation, at the time when the garnishee order was served upon the bank there was a debt due from them to the defendant in respect of this sum of 17*l.* 12*s.* 6*d.* as well as in respect of the sum of 6*l.* 13*s.* 8*d.* The order of the Master was right.

H. A. McCardie, in reply. The pay warrant is not a negotiable instrument. A negotiable instrument is one which

(1) [1903] A. C. 240, at p. 245. (2) [1904] 2 K. B. 465, at p. 470.

1909

JONES & Co. v. COVENTRY.

contains a contract or promise to pay, and the person to whom the instrument is negotiated can sue upon the contract or promise contained in it. The test as to whether an instrument is or is not a negotiable instrument is stated by Blackburn J. in *Crouch* v. *Credit Foncier of England* (1), adopting the language used in the notes to *Miller* v. *Race* (2): "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, there it is entitled to the name of a negotiable instrument." The document here contains no promise by the Crown or the Paymaster-General to pay; it is really a mere receipt, and the bank could not have sued upon it. *Capital and Counties Bank* v. *Gordon* (3) was the case of a cheque, which is a negotiable instrument.

DARLING J. This case raises an important and curious question. The matter occurs thus: The defendant became entitled to retired pay, which I will call pension, upon his retirement from the Army, the pension being given entirely for services already rendered, and not in any respect in expectation of services to be rendered in the future, and therefore this pension is different from half pay. The defendant was in the habit of authorizing his bank to collect the pension when it became due, and to pay it into his account at the bank, into which no other moneys were paid. He had a judgment creditor who obtained a garnishee order nisi attaching all debts owing or accruing due from the bank to him, and the result of that order was that, if the bank owed any money to the defendant at the time when the order was served, the bank might be ordered to pay the money to the judgment creditor, and if they failed to do so execution might issue to recover it. There was, in fact, on January 1, 1909, a sum of 6*l*. 13*s*. 8*d*. standing to the defendant's credit at his account at the bank, which represented the balance of pension moneys which the bank had some time before collected from the Paymaster-General and paid into his account. The garnishee

(1) (1873) L. R. 8 Q. B. 374, at p. 381.

(2) 1 Smith L.C., 2nd ed., p. 259; 11th ed., p. 473.

(3) [1903] A. C. 240.

order nisi was served upon the bank on the afternoon of January 1, and at that time there was also standing to the defendant's credit a further sum of 17*l.* 12*s.* 6*d.* which the bank had credited to his account on that day, and to which different considerations apply. I shall therefore deal with this latter sum later on.

With regard to the sum of 6*l.* 13*s.* 8*d.*, it is argued on behalf of the defendant that this sum cannot be attached under the garnishee order because it is pension money, and that pension money, so long as it can be identified as such, cannot be taken in execution, even though it be in the possession of the pensioner or his agent. If that is correct, it can only be because s. 141 of the Army Act, 1881, applies to such a case. That section says that "Every assignment of, and every charge on, and every agreement to assign or charge, any deferred pay or military reward payable to any officer or soldier of any of Her Majesty's forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a Royal Warrant for the benefit of the family of the person entitled thereto, or as may be authorised by any Act for the time being in force, be void." In my opinion that section does not apply to this sum of 6*l.* 13*s.* 8*d.* I cannot accept the contention that a sum of money which is the result of payments of pension cannot be taken in execution by reason of the provisions of the above-mentioned section, even though it has come into the possession of the pensioner. I do not think that the section bears that construction, nor do the cases, when they are looked at, give any support to it. In *Crowe* v. *Price* (1), a case which was relied upon in support of this contention, Lord Esher said: "I adhere to the opinion expressed by this Court in *Lucas* v. *Harris* (2) that s. 141 of the Army Act, 1881, was passed in favour of officers and soldiers on grounds of public policy, and that it must be construed so as to protect pensions granted to hem for their services. The question in the present case is whether this sum of 109*l.* has ceased to be pension, for if it has

(1) 22 Q. B. D. 429, at pp. 433, 434. (2) 18 Q. B. D. 127.

1909

JONES & CO. v. COVENTRY.

Darling J.

not it is money which could not be taken in equitable execution." Fry L.J. said: "The money remained pension, of which one may use the expression that it had not been 'reduced into possession.' It might be different if the officer had received it, and had paid it into his bankers, or had bought furniture with it. But this did not happen; the money was intercepted for a limited purpose, which came to an end while the money was still on its way to the officer, and it never lost its character of pension." That is the true test, namely, whether the money had lost its character of pension or whether it still remained pension. In my opinion pension, when it has been paid to the person entitled to receive it, ceases any longer to be pension; it has lost its character of pension, just like dividends which, after payment, lose their character of dividends. It becomes part of the pensioner's ordinary money. I think, therefore, that this sum of 6*l.* 13*s.* 8*d.*, which was the balance of pension moneys paid to the bank and credited by the bank to the defendant's account, had lost its character of pension, and accordingly it does not come within the provisions of s. 141 of the Army Act, 1881. It became an ordinary debt due from the bank to the defendant and can be attached under the garnishee order. As to this sum of 6*l.* 13*s.* 8*d.* I think that the appeal fails.

There remains the sum of 17*l.* 12*s.* 6*d.* This sum became due to the defendant on January 1, 1909, the day on which the garnishee order was served on the bank, in respect of his pension for the preceding quarter. Upon that day he sent to his bank at Birmingham a formal document, duly filled in and signed by him, which is specially provided for the purpose of enabling an officer to receive his pension. It said "Received of H. M. Paymaster-General" the 1st day of January, 1909, a certain sum. This document, when filled in and signed, had to be presented to the Paymaster-General for payment by a London banker, to whom alone the sum named therein would be paid, and accordingly the defendant sent it to his bank, who forwarded it to their head office in London for presentation. The money was not paid until January 7, but upon January 1, as soon as the document was received by the bank at Birmingham, they

provisionally credited the defendant with the amount although they had not received the money. This, however, seems to me to have been merely a matter of arrangement between the defendant and the bank, and did not affect the question of payment of the pension. It was done for the convenience of the defendant, and cannot affect the real state of matters, namely, that the bank had not then received the money, which was in the possession of the Paymaster-General. The garnishee order nisi was served on the bank on January 1 after this sum had been placed to the defendant's credit.

Now the contentions on each side are these. It is contended on behalf of the defendant that what happened between him and the bank, if it had any effect at all in making this sum of money prima facie attachable under the garnishee order, amounted to an assignment or charge upon the pension, and is therefore void as being forbidden by s. 141 of the Army Act, 1881. It is contended on behalf of the plaintiffs that this is not an assignment or charge; that the pension, being retired pay given solely in respect of past services, and not in respect of future services, was alienable at common law either by assignment, or by a charge, or by giving a negotiable instrument in respect thereof; and that the Act, by expressly forbidding assignment or charge, has not struck at negotiation. Though this case does not raise the question as to the distinction between retired pay and half pay, yet it is advisable to bear the distinction in mind, and in *Crowe* v. *Price* (1) Lord Coleridge C.J. pointed it out: "The order of the Court must be different as regards the two sums of which this fund is composed. One is part of the pension paid by the State to the defendant, a retired military officer. The other is a sum which has been paid by the State in respect of a portion of his pension which he has been allowed to commute. As regards the sum which represents payments to the defendant in respect of his pension, the application of the plaintiff must fail. This sum cannot be taken in execution. The case is governed by s. 141 of the Army Act, 1881. That section removed the distinction drawn by the common law between pensions awarded to servants of the Crown entirely as a compensation for

(1) 22 Q. B D. 429, at p. 431.

1909

JONES & CO. v. COVENTRY.

Darling J.

past services, and allowances, such as half pay, in which a part of the consideration was the liability of the recipient to serve the Crown again. The former class of allowances the common law regarded as alienable, the latter as inalienable because granted for the express purpose of enabling persons who might be again employed in the service of the Crown to maintain a decent position and to avoid falling into poverty." That states how the matter stood at common law. As Lord Coleridge pointed out, s. 141 of the Army Act, 1881, altered that and enacted that retired pay could not be assigned or charged, thereby placing it in that respect upon the same footing as half pay. Now, assuming that there can be a negotiation which does not amount to an assignment, as to which I do not stop to inquire, the question with regard to this sum of 17*l.* 12*s.* 6*d.* is whether what was done with the pay warrant amounted to a negotiation of it. It is contended on behalf of the plaintiffs that the document which was given to the bank for presentation to the Paymaster-General is a negotiable instrument. In my opinion it is not, and I think that the reasons given by the learned counsel for the defendant in his reply shew that it is not. It is impossible to contend that the bank could have sued the Crown or the Paymaster-General upon this document. I take no notice of the fact that any proceedings would have to be by petition of right. That is a matter of procedure. There is no promise in the document to pay the officer the pension. No doubt the Paymaster-General pays the pension upon presentation by a London banker of the document, duly filled in and signed, but there is no promise, either express or implied, to pay the amount to any one who may be the bona fide holder for value; and if the instrument is not capable of being sued upon by the bona fide holder for value it does not fulfil one of the tests mentioned by Blackburn J. in *Crouch* v. *Credit Foncier of England* (1), and is not a negotiable instrument. Upon its face the document is a mere receipt. The language of Lord Macnaghten in *Capital and Counties Bank* v. *Gordon* (2), upon which reliance was placed on behalf of the plaintiffs, does not seem to me to have any application to this document. He

(1) L. R. 8 Q. B. 374, at pp. 381, 382. (2) [1903] A. C. 240, at p. 245.

there says: "It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account, the banker becomes holder for value of the cheque." I do not think that that language applies to this document. A cheque has all the well-known qualities of a negotiable instrument. What Lord Macnaghten said, though true of a cheque, is not true of a document which has not any of those qualities. His remarks had regard to the document before him and do not apply to this document, which is a mere receipt and is not a negotiable instrument. Until the money is actually paid by the Paymaster-General the document has no operation at all and is in the nature of an escrow. The money was not paid by the Paymaster-General until January 7, and therefore the document had no operative effect until then. It is said that the document is a negotiable instrument by reason of the note at the foot of it which states that "this receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination." That requires the document to be presented by a London banker, but for the convenience of persons living away from London it tells them that they may send it to a country or foreign banker, who will send it to a banker in London for presentation. The footnote is no portion of the operative part of the document. It does not prevent the document from being merely a receipt, and a receipt which is not operative until the money is paid by the Paymaster-General to the London banker on behalf of the officer. The document here was handed by the defendant to the bank to collect the pension on his behalf, and I cannot see that the pension ceased to be payable to the defendant by reason of the document being handed to the bank for presentation to the Paymaster-General. To my mind the word "negotiation" is not a proper word to apply to the transaction. Until January 7 the money remained in the hands of the Paymaster-General, and on that day it was paid to the bank. The garnishee order nisi can have no prospective operation and cannot affect a debt due from the bank to the defendant which only arose on that day. If the transaction on January 1 had

1909

JONES & CO. v. COVENTRY.

Darling J.

any operation at all, it could only amount to an assignment, and would be void under s. 141 of the Army Act, 1881. I do not, however, think that there was an assignment. The money remained the money of the Crown until it was paid by the Paymaster-General on January 7.

The appeal therefore succeeds as to the sum of 17*l.* 12*s.* 6*d.*, and fails as to the sum of 6*l.* 13*s.* 8*d.*

JELF J. I am of the same opinion. It seems to me that the learned Master who tried this issue correctly stated the law applicable to this case. He said this: "I hold that when once the money reaches the officer's banking account it ceases to be impressed with the character of pension; the only concern of Parliament being to see that the money reaches the officer, and is not intercepted on its way to his hands or account." That is a perfectly correct statement of the law, and I entirely agree with it. It is only when I come to apply the law as so stated to these two sums of money that I arrive at the conclusion that one of them can be reached by this garnishee order and that the other cannot.

With regard to the sum of 6*l.* 13*s.* 8*d.* the facts shew that this sum was standing to the credit of the defendant at the Birmingham branch of the National Provincial Bank of England on January 1, 1909, as the result of ordinary banking transactions which had been going on for some time. This sum was the balance of pension money which had been received from the Paymaster-General and paid into the bank before January 1, 1909. When the pension money was received and paid into the defendant's account he drew cheques against it and it was treated as an ordinary banking account. When the money was received from the Paymaster-General it lost its character of pension. I cannot accept the argument that an officer who has received his pension from the Paymaster-General can place himself in a better position than he would otherwise be in by keeping the money separate from his other moneys, such as by opening a special account into which the pension is paid or by keeping it in a box by itself, and then be able to say that the money is not liable to be taken by his creditors in

payment of their just claims. That contention seems to me to be untenable. When the authorities are looked at it will be seen that they entirely support the proposition of law stated by the learned Master, and therefore I think that the sum of 6*l.* 13*s.* 8*d.*, which on January 1, 1909, when the garnishee order nisi was served upon the bank, was standing to the credit of the defendant at the bank, was in the same position as any other money which might be owing to him.

A more difficult question arises with reference to the sum of 17*l.* 12*s.* 6*d.* If that sum had been received from the Paymaster-General and paid into the defendant's account at the bank on January 1, 1909, at that moment it would have ceased to be pension and would have become an ordinary sum of money standing in the bank to the credit of his account, that is to say, the relation of creditor and debtor would have arisen between him and the bank, and that debt could have been properly attached under the garnishee order. If that had been the state of the facts, the same principle would have applied as is applicable to the sum of 6*l.* 13*s.* 8*d.*, with which I have already dealt. But instead of that being so, we find that this sum of 17*l.* 12*s.* 6*d.* was paid by the Paymaster-General to the bank on January 7. It is clear that this garnishee order cannot affect any sum of money which was received by the bank after service upon them of the order on January 1, and therefore cannot affect this sum which was only received on January 7. What happened between January 1 and January 7, when the warrant was paid by the Paymaster-General, was this. The bank on January 1 credited the defendant's account with the full amount of the warrant, an through their head office in London presented the warrant for payment, and it was paid on January 7. It was contended that the warrant was a negotiable instrument, and that the bank, by crediting the defendant with the amount on January 1, became the holders for value of the warrant, and that the defendant ceased to have any interest in it, and that the bank became a debtor for that amount to the defendant on January 1. I can find nothing to support that contention. Whatever may be the case with a negotiable instrument, this document, though it may have some of the appearance of a negotiable instrument, is really a mere

1909

JONES & CO. v. COVENTRY.

Jelf J.

receipt, which has no operation until the money is paid, and the right of the officer to receive the pension is not derived from the document, but from the contract, if there is a contract, with the Crown, apart from the document altogether, under which the pension is payable to the officer for services which he has already rendered. The document in question, which is in a certain form intended for the purpose of giving a proper receipt to the Paymaster-General, can be obtained at certain offices. There is no difficulty in obtaining the forms. The document says that "this receipt must be presented for payment by a London banker." To my mind the document, until presentation and payment of the amount, is not an effective instrument at all; it certainly is not a negotiable instrument. It is a document which until presented for payment to the Paymaster-General has no operation. It is in the nature of an escrow. Therefore the contention which has been urged before us on behalf of the plaintiffs fails. If the document had been a cheque, then no doubt, in the circumstances, the bank would have become the holders of the cheque for value, and they could have claimed the amount thereof from the Paymaster-General, and the defendant would have ceased to have any interest in it. But this document is not a cheque, nor is it in the same category as a cheque. The officer who is entitled to a pension has to go through certain forms before he can get his pension from the Paymaster-General. He has to sign the declaration in the form in the presence of a witness, and he has to sign a form of receipt, also contained in the document. He must then hand it to his banker, and it must be presented for payment to the Paymaster-General by a London banker. The Paymaster-General will not accept a general order to pay the pension to the officer's bank, but will only pay upon presentation of the document by a London banker when it has been duly filled in and signed by the officer. In my opinion no garnishee order can affect the money until it has been paid to the bank by the Paymaster-General. To hold otherwise would be to decide in the teeth of s. 141 of the Army Act, 1881. Until the money is received from the Paymaster-General it is still pension and is subject to the restrictions imposed by that section. Therefore this garnishee order cannot touch this sum of 17*l.* 12*s.* 6*d.* The

result is that the order of the Master must be varied by allowing the appeal as to that sum.

1909

JONES & CO. v. COVENTRY.

Order varied.

Solicitors for plaintiffs: *Rundle & Hobrow.*

Solicitor for defendant: *H. G. Kenyon, for Reece & Harris, Birmingham.*

W. F. B.

THE KING *v.* THE BOARD OF EDUCATION.

1909

July 26, 27, 30.

Education—Public Elementary School—Teachers—Salaries—Provided and Non-provided Schools—Local Education Authority—Right to discriminate—Failure to maintain and keep efficient—Board of Education—Decision—Want of Jurisdiction—Certiorari—Mandamus—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

On the coming into force of the Education Act, 1902, the local education authority of Swansea continued to pay salaries to the teachers in the schools in the district at the rates previously in existence, the salaries paid to teachers in provided schools being at a higher rate than those paid to teachers of similar qualifications in non-provided schools. Subsequently an increase was made in the salaries paid to teachers in the provided schools only, and the managers of a non-provided school in the district complained to the Board of Education that the local education authority, by refusing to pay salaries in the non-provided school at the same rate as in the provided schools, had failed to maintain and keep efficient the non-provided school, as provided by s. 7 of the Education Act, 1902. The Board appointed a barrister to hold an inquiry, who, after hearing evidence on behalf of the managers, reported that the school had regularly earned the grant, but only through the deficiency in salaries having been made good by the managers, and that the local education authority had failed to maintain and keep efficient the school. The Board of Education decided that there had been no such failure by the local education authority, on the grounds that there was no statutory right on the part of the managers of any particular school to receive any particular scale of salaries, and that it had not been shewn that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question:—

Held, that the local education authority had no power under the Education Act, 1902, to discriminate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries to be paid in provided schools and those to be paid in non-provided schools.

Held, also, that the decision of the Board of Education was bad and

1909

REX
v.
BOARD OF EDUCATION.

must be quashed, and that a mandamus should issue to the Board of Education directing them to determine the question according to law, on the grounds (1.) that the decision of the Board was based on a disregard of the duties imposed on the local education authority by the Act of 1902, and was therefore made without jurisdiction; and (2.) that the Board, in deciding that it had not been shewn that teachers could not be obtained at the lower scale of salary, had not decided the real question submitted by the managers to the Board for their decision.

RULES nisi to the Board of Education to shew cause why a writ of certiorari should not issue directed to the Board to quash a certain decision of the Board dated December 17, 1908, of questions which had arisen between the managers of the Swansea, Oxford Street, (Church of England) school and the local education authority for the county borough of Swansea, and why a writ of mandamus should not issue directed to the Board to determine the said questions in accordance with the provisions of the Education Act, 1902, and the Education Acts.

The following statement of facts is taken from the written judgment of Lord Alverstone C.J.:—

"Prior to September 26, 1904, there existed in Swansea eight or nine voluntary schools, and some eighteen or nineteen board schools. Upon that date these schools came under the provisions of the Education Act, 1902, and for some time the salaries paid to the teachers in the various schools remained the same as had been paid prior to the Act of 1902 coming into operation, the Swansea education authority announcing on November 3, 1904, that all salaries would remain as in the then previous year. At this time the salaries of teachers paid by the old board schools were higher than those paid in the voluntary or non-provided schools for teachers of the same class, and in consequence the managers of the non-provided schools endeavoured to get the local education authority to adopt the same scale of salaries for the teachers in non-provided as those in force in the provided schools, and upon November 24, 1905, Mr. Eden, the correspondent of the Oxford Street school, wrote to the secretary of the Board of Education, alleging that the managers of the Oxford Street school formally charged the education committee with failure of their duty in providing salaries necessary for the maintenance of the school. He stated that they made this charge

under s. 7 of the Act of 1902, and that they had repeatedly pointed out that the local education authority were discriminating against the non-provided schools in the matter of salaries, and that the managers ran great risk of losing some of their teachers from the failure of the managers to pay proper salaries. It is unnecessary to refer at length to the subsequent correspondence which passed between the managers, the local education authority, and the Board of Education, the condition of matters being somewhat complicated by certain requirements as to structural alterations made by the local education authority as regards certain of the non-provided schools, but the substantial position taken up on the one side and the other never changed, i.e., the local education authority declining to allow the scale of salaries which was applicable to the provided schools to apply in the case of non-provided schools. On July 31, 1906, the Board of Education wrote to the local education authority a letter which is of importance, as it brings out clearly the question which was at issue between the two bodies, the managers and the local education authority: 'Sir, — I am directed to state that the question of teachers' agreements in the National Parochial York Place and Christ Church Infants' National Schools has been again before the Board, who have received from the managers agreements duly signed by the teachers, which the managers will be ready to sign and complete, as soon as the authority will give their consent to the same. It is stated that the amount of salary paid in each case is filled in at the rate of scale paid to teachers in the council schools in the area. The Board of Education are not aware of any circumstances which would justify a differentiation in the salaries paid to teachers in voluntary and council schools. They feel that the present uncertainty is unjust to teachers, and is gravely imperilling the efficiency of the schools. They trust therefore to learn at an early date that the authority will give their consent to the agreements prepared. In view of the provisions of article 15 of the Code the Board do not feel able to sanction payment of the grants for the National and York Place schools until they are assured that this matter has been satisfactorily arranged. I am, &c., C. L. Kingsford. To the Local Education Authority.' The agreements referred to in this

1909

REX v. BOARD OF EDUCATION.

letter were agreements whereby it was proposed to pay the teachers in the non-provided schools the same scale of salaries as in the provided schools. Notwithstanding this, the local education authority declined to abandon the position which they had taken up, and further correspondence passed between the managers, the local education authority, and the Board of Education. So matters remained until the early part of 1907. On April 17 of that year the local education authority published an amended scale respecting the qualifications and salaries applicable to teachers in provided schools. This scale increased the remuneration payable to the teachers in the provided schools, and gave them certain further advantages in the matter of payment, to the particulars of which it is not necessary to refer, but at the same time the local education authority declined to allow this scale to apply to the teachers in the non-provided schools, and informed Mr. Eden, the correspondent of the Oxford Street school, that the local education authority were prepared to consent to the salaries hitherto paid. Finally, on February 3, 1908, Mr. Eden wrote to the Board of Education stating that the issue between the managers and the local education authority which the Board had to determine was whether the local education authority in fixing and paying the salaries of the teachers fulfilled their duty under sub-s. 1 of s. 7 of the Act of 1902, and, secondly, whether the salaries inserted in the teachers' then present agreements were reasonable amounts and ought to be paid by the authority, or what salaries the authority ought to pay, the salaries so inserted being in accordance with the scale of payment sanctioned by the local education authority for provided schools.

"It was not suggested by the learned Solicitor-General, who appeared for the Board of Education, or by Sir D. Brynmor Jones, who appeared for the local education authority, that the non-provided schools were not of the same class as the provided schools, or that the standard of education in the two was different. On the contrary, the learned Solicitor-General admitted in distinct terms that the standard of education in the two classes of schools was the same. In this state of things the Board of Education on July 9, 1908, gave notice of a public inquiry by

1909

REX v. BOARD OF EDUCATION.

Mr. J. A. Hamilton, K.C., alleging that a question had arisen within the meaning of sub-s. 3 of s. 7 of the Education Act of 1902 between the local education authority and the managers of the Oxford Street school, and that representations had been made to the Board of Education to the effect that the local education authority had failed to fulfil their duty under the Education Acts, 1870 to 1907, with respect to the staff of the school."

The notice was as follows:

"Notice of Public Inquiry.

"Whereas it is alleged that a question has arisen within the meaning of sub-s. 3 of s. 7 of the Education Act, 1902, between the council of the county borough of Swansea, being the local education authority for the area of that county borough, and the managers of the Swansea, Oxford Street, (Church of England) school, being a school within that area not provided by the local education authority, with respect to the staff of the said school; And whereas representations have been made to the Board of Education to the effect that the local education authority have failed to fulfil their duty under the Education Acts, 1870 to 1907, with respect to the staff of the said school; And whereas the Board of Education have determined to hold a public inquiry under s. 73 of the Elementary Education Act, 1870, and s. 23, sub-s. 10, of the Education Act, 1902, with a view to satisfying themselves as to the said obligation and representations:

"Now the Board of Education give notice that John Andrew Hamilton, Esquire, one of His Majesty's counsel, will attend at the Guildhall, Swansea, on Friday, July 31, 1908, at 10 o'clock in the forenoon, for the purpose of holding the said inquiry, and will then and there, or at any adjournment of the inquiry, hear, receive, and examine any evidence and information offered, and hear and inquire into any objections or representations made respecting the subject of the inquiry.

"Dated this 9th day of July, 1908.

"(Signed) Alfred T. Davies,

"Secretary of the Welsh Department of the Board of Education."

"It was not disputed that, at this stage of the proceedings, the

1909

REX v. BOARD OF EDUCATION.

one substantial ground of complaint on the part of the managers of the Oxford Street school was that the local education authority had discriminated between the non-provided and provided schools by establishing as regards the provided schools a higher scale of salaries for teachers with the same qualifications and performing the same educational duties. It is not necessary to elaborate this further or to do more than quote from the statement of the points raised before Mr. Hamilton on the one side or the other. The managers in their statement alleged that 'the local education authority have failed, and are failing, to fulfil their duties under the Education Acts, 1870—1907, as respects the Oxford Street Church of England school, and, in particular, have failed to provide sufficient sums to pay adequate salaries to the teachers in the school, and in so doing are discriminating contrary to the above-mentioned Acts between schools provided and those not provided by them. The salaries which the local authority have paid, and are paying, to the teachers are below the market rate of salaries in the area, being less than the amounts regularly paid, according to a scale adopted by the authority, to teachers of similar qualifications for similar services in schools provided by the authority. The salaries so paid to the teachers in the Oxford Street school are wholly inadequate. The teachers refuse and have refused to serve at such salaries, and since April, 1907, the managers have only retained their services by paying them in addition to the amounts provided by the local authority further amounts sufficient to make their salaries equivalent to the salaries paid to teachers in the schools provided by the local authority'; and, further, in the summary of their contentions the managers asked that the teachers' salaries should be those contained in the agreements made between them and the managers, and that in future the school should be maintained by the local authority without any discrimination as to salaries between it and schools provided by the authority. On the other hand, the local education authority in their statement claimed the right to fix the amount of salaries to be paid to the teachers in the non-provided schools independently of the scale of rates of salaries paid in the provided schools, and this contention was one of the main contentions urged by Sir D.

Brynmor Jones on behalf of the local authority, and he contended, as set out by Mr. Hamilton in his report, that 'control of expenditure implies and involves discrimination between school and school, and between teacher and teacher, and that, if they see fit, the authority are entitled to discriminate between provided and non-provided schools, even though their circumstances are educationally the same, and to decide what kind of schools they will maintain, and what degree of education they will provide without appeal; that the authority's control of expenditure is itself uncontrolled and uncontrollable, and not the subject of inquiry or determination by the Board of Education.'

"No evidence was called by Sir D. Brynmor Jones before Mr. Hamilton; he relied upon the answers given by Mr. Eden, the principal witness for the managers, to support the contentions which he raised. It is unnecessary to refer to the conclusions or findings of fact of Mr. Hamilton, because it was conceded by the counsel for the managers that the Board of Education, in exercising their jurisdiction under the statute to which we have presently to refer, were not bound by the findings of fact of Mr. Hamilton, if upon materials properly before them they had ground for coming to another conclusion in fact; but it is important to observe that not only was no evidence called before Mr. Hamilton on behalf of the local education authority, but, as far as we know, no additional facts were before the Board of Education before they pronounced their decision upon the difference which had arisen. (1)

"Upon December 17, 1908, the Board of Education announced their decision in the following terms:—'The Board are of opinion that no sufficient evidence has been adduced to prove that the authority have so failed, and they see no substantial grounds for supposing that the task of the managers in procuring teachers at the scale of salaries to which the local education authority consented in their letter of April 18, 1907, was an impossible one, or that they could not have filled any such vacancies as occurred or might occur at that scale if they had determined so to do. It is suggested that the future efficiency

(1) Certain passages from the report of Mr. Hamilton are set out in the judgment of Darling J. at pp. 1065—1067.

1909

REX v. BOARD OF EDUCATION.

of the school would be imperilled by the employment of teachers at the lower rate of pay, but this is a somewhat remote speculation, and ought not, in the view of the Board, to prevail against the judgment of the local authority that the school can in fact be maintained in a state of efficiency on the rates of pay which they are willing to provide. There is no statutory right on the part of the managers of any particular school to receive from the authority any particular scale of salaries for their teachers. That is a matter entirely for the authority which controls the expenditure, subject only to the obligation to give such salary as will procure teachers capable of keeping the school efficient. The contention of the authority that the only question arising here is one of control of expenditure does not adequately indicate the whole point at issue. The crucial question is whether their proposed expenditure is adequate for the performance of their statutory obligation. As already stated, the Board do not find upon the evidence that the money provided by the authority for the salaries of the teachers has been shewn to be inadequate for this purpose, and they decide accordingly that the authority have not failed in their duty to maintain and keep efficient the Oxford Street school.' "

The rules were obtained on the grounds — (1.) That the decision of the said questions purporting to have been made by the Board of Education on December 17, 1908, was ultra vires and in excess of the powers conferred upon the Board by the Education Act, 1902, s. 7, inasmuch as it proceeded upon views as to the powers and duties of the Board and of the local education authority under the Act which were erroneous in point of law, namely, that the Board and the local education authority had the right under the Act of 1902 to discriminate as regards maintenance and efficiency between provided and non-provided schools to the disadvantage of the latter, and that the Board in deciding questions between the managers and the local education authority under s. 7 of the Act were entitled to proceed upon the view that there was not under the Act incumbent upon the local education authority the duty of maintaining and keeping efficient all public elementary schools according to the same standard of efficiency, unless

special educational reasons could be shewn for the distinction, and that the local education authority were justified in making a differentiation between the scale of salaries to be paid to teachers in provided schools and that of salaries to be paid to teachers in non-provided schools, although there were no special circumstances to make such differentiation proper, and that the Board were justified in sanctioning such differentiation, and that the local education authority were justified in paying teachers in non-provided schools only the salaries paid in such schools before their transference to the local education authority under the Act of 1902, although such salaries were lower than those paid in provided schools and necessary for maintenance and efficiency; and that the Board had power to sanction payment of such lower rate though there were no special circumstances to justify it; and that the duty of the local education authority was limited to maintaining and keeping efficient the non-provided schools at the same level at which they stood before the transference, and that capacity to earn Government grant was a legal measure of efficiency under s. 7, sub-s. 1, of the Act, and that a lower standard of efficiency for earning the grant could be adopted with regard to non-provided schools than with regard to provided schools; and, further, that there could not be failure to keep efficient under s. 7, sub-s. 1, of the Act, unless there had been in fact failure to obtain the Government grant, and that the local education authority were not bound to maintain and keep efficient non-provided schools out of public money, and that the fact that by voluntary contributions the services of teachers had been secured so that the school had been enabled to obtain the Government grant prevented there being failure of duty by the local education authority under the Act; whereas the jurisdiction conferred upon the Board of Education to decide questions between the managers and the local education authority was one which must be exercised under and in conformity with the provisions of the Act. (2.) That the decision of the Board was erroneous in point of law in the several respects above mentioned. (3.) That the decision of the Board proceeded upon the assumption, which was unsupported by any evidence, and which was contrary to the evidence, that the local education

1909

REX v. BOARD OF EDUCATION.

authority exercised their judgment upon the question whether the school could be maintained and kept efficient on the rates of pay which the local education authority were willing to provide, and that the Board could not interfere with the control of expenditure in this respect by the local education authority. (4.) That, if and so far as the decision proceeded upon findings of fact at variance with those embodied in the report of the inspector, Mr. J. A. Hamilton, K.C., dated September 30, 1908, such findings had not been judicially arrived at, being perverse and contrary to the evidence and without any evidence to support them.

In answer to the rules, an affidavit by the assistant secretary to the Board of Education (legal branch) had been filed, in which he stated: "The Board considered the question whether or not the local education authority had made any default in maintaining and keeping efficient the Oxford Street Church of England school, Swansea, and came to the conclusion and decided that no such default had been proved. The Board considered the point, which was raised before the commissioner, that the evidence did not establish that the sums which the local education authority had decided to provide, and had provided, were not sufficient to secure, and would not have secured, all such teachers as were necessary for the purpose of the said school being kept efficient, and the Board found that the evidence did not establish it, and they determined that no such default as that alleged had been made by the local education authority."

Sir S. T. Evans, S.-G., and *Rowlatt*, for the Board of Education, shewed cause against the rules. In the circumstances of this case certiorari will not lie, nor should a writ of mandamus be granted. The Board of Education are a statutory body created by the Board of Education Act, 1899 (62 & 63 Vict. c. 33), and their duties and powers, which are those previously exercised by the Education Department, are purely ministerial. The question which the Board had to decide in this case was whether the local education authority had performed the duty, imposed upon them by s. 7 of the Education Act, 1902, of maintaining and keeping efficient this particular non-provided

school. The Board have considered that question and have decided that the local education authority were not in default. The decision of the Board was not a judicial but an administrative act, and the correctness of the decision cannot be called in question by certiorari, even though the Court might be of opinion that the decision was wrong in law: *Rex* v. *Commissioners of Income Tax.* (1) The Board having decided that this school has in fact been maintained and kept efficient, it is immaterial to consider the question as to the right of the local education authority to discriminate between the salaries paid to the teachers in provided and in non-provided schools; but it is submitted that the question as to what salaries shall be paid is one solely for determination by the local education authority, and provided that a school is duly maintained and kept efficient there is nothing to prevent the local education authority from paying different rates of salaries in different schools. If in the opinion of the Board of Education a particular school is efficient, the Board have no power to dictate to the local education authority what salaries shall be paid in that school. [They referred to *Crocker* v. *Plymouth Corporation.* (2)]

Sir D. Brynmor Jones, K.C., Lloyd Morgan, K.C., and *S. Hill Kelly,* for the Swansea Corporation, the local education authority, also appeared to shew cause against the rules and adopted the above argument without adding anything further.

Sir R. B. Finlay, K.C., and *C. A. Russell, K.C.* (*Aubrey T. Lawrence* and *R. P. Hills* with them), for the managers of the Oxford Street school, Swansea, in support of the rules. It is an evasion of the real point at issue in this case to say that the finding of the Board of Education, that this school has been maintained and kept efficient, is one of fact. The Board in so deciding were obviously referring only to the grant-earning capacity of the school, but that is not the true test. The main purpose of the Act of 1902 was to remove the inequality between the provided and non-provided schools, and both classes of schools must be maintained at the same standard of efficiency: see the argument of Sir J. Lawson Walton, A.-G., in *Attorney-General* v. *West*

(1) (1904) 91 L. T. 94. (2) [1906] 1 K. B. 494.

1909

REX v. BOARD OF EDUCATION.

Riding of Yorkshire County Council (1), which was adopted by Lord Davey in the same case as a correct statement of the law. The local education authority and the Board of Education assert that there is a right to discriminate between the salaries paid respectively to teachers in provided and non-provided schools, so long as the latter earn the grant, although the inevitable consequence must be that they are permanently kept at a lower level of efficiency than provided schools of the same grade. There is no right to discriminate in this way, and in adopting this view the Board have acted on a wrong view of the law and have not decided the real question which has arisen in this case. If it is said that the Board's decision is one of fact and that it cannot be interfered with, the answer is that it is not a bona fide finding of fact, for the Board have not said that this school could be kept at the same level of efficiency as the provided schools if lower salaries were paid to the teachers, and if they had said that, it would have been directly contrary to the evidence at the inquiry.

[LORD ALVERSTONE C.J. We have only to consider whether the Board have entertained the right question, not whether their decision was wrong.]

The Board have not considered the right question, but have, as was said by Cockburn C.J. in *Reg.* v. *Adamson* (2), acted on a "consideration of something extraneous." They have decided that the local education authority have power to discriminate between the salaries. That is contrary to the Act, and the Board have no power to go outside the Act, and a decision as to the obligation of the local education authority which is in contravention of the Act is not a decision within the jurisdiction of the Board. They have in fact given themselves increased legislative powers. The Board have no power to interpret the Act, for that, as Channell J. said, is for the Court: *Wilford* v. *West Riding of Yorkshire County Council.* (3) The decision of the Board was ultimately based on the view that it had not been shewn that the money provided for the salaries was inadequate, but that was not the real question submitted to the

(1) [1907] A. C. 29, at pp. 30, 38. (2) (1875) 1 Q. B. D. 201.
(3) [1908] 1 K. B. 685.

Board. The whole point in dispute was as to the right of the local education authority to discriminate between the scales of salaries paid to the teachers in the two classes of schools, and that question could only be answered by the Board in favour of the authority by ignoring the provisions of the Act of 1902, as interpreted by the House of Lords, which the Board had no power to do, and the decision was therefore ultra vires and void. (1) [They also referred to *Reg.* v. *Poor Law Commissioners.* (2)]

Cur. adv. vult.

July 30. LORD ALVERSTONE C.J. read the following judgment:—In this case two rules nisi were granted, on the motion of Sir Robert Finlay, on behalf of the managers of the Oxford Street school, Swansea, the one to shew cause why a writ of certiorari should not issue for the purpose of quashing a certain decision of the Board of Education; the other to shew cause why a writ of mandamus should not issue calling on the Board of Education to determine a question which had arisen between the managers of the Oxford Street school, Swansea, and the local education authority for the county borough of Swansea. The grounds on which these rules were moved, which were practically the same, are fully stated in the rules, and it is not necessary to recite them at length here, nor would it serve any useful purpose to refer to them until the facts upon which the questions arise have been stated. [The Lord Chief Justice stated the facts as set out above, and continued:—] Upon this decision two important and difficult questions are raised on behalf of the managers. It was urged first, in support of the rule for certiorari, that the decision was bad and ought to be quashed, upon the ground that the Board of Education had exceeded their jurisdiction by deciding a question not before them and not raised between the parties, or had misconstrued the Act of 1902, in

(1) Sir R. B. Finlay, in the course of his argument, proposed to refer to certain speeches which had been delivered in Parliament by the Prime Minister in the course of the debate on the Address, which had been read to the Court on the motion for the rules nisi. The Solicitor-General objected, and Sir R. B. Finlay did not press his claim to be entitled to read the speeches.

(2) (1860) 12 Ir. C. L. R. 212.

1909

REX v. BOARD OF EDUCATION.

Lord Alverstone C.J.

order to give themselves jurisdiction to decide in the terms in which they had decided. It was further contended in support of the rule for mandamus that the Board of Education had not decided the main, if not the only important, matter of dispute between the managers and the local education authority, as to whether the local education authority had a legal right to discriminate between the provided and the non-provided schools as such, and to fix in respect of the same classes of teachers one scale of salaries for the provided and another for the non-provided schools.

As to the first of these points it was contended by the learned Solicitor-General on behalf of the Board of Education that the Board had decided a matter within their jurisdiction, and, even assuming that they decided wrongly on a point of law, no writ of certiorari could issue, and, secondly, that the decision of the Board did determine the matter in dispute between the parties, and therefore no mandamus ought to issue.

Before dealing with these questions it is, we think, necessary to consider briefly the position of the Board of Education. By s. 7 of the Board of Education Act, 1899, the Board may sue and be sued by the name of the Board of Education. Under sub-s. 3 of s. 7 of the Act of 1902 the Board of Education have to determine any question arising under that section between the local education authority and the managers of the non-provided schools, and by s. 16 of the same Act, if a local education authority fail to fulfil any of their duties under the Elementary Education Acts, 1870 to 1900, or the Act of 1902, the Board of Education may, after holding a public inquiry, make such order as they think necessary or proper for the purpose of compelling the authority to fulfil their duty. Under sub-s. 10 of s. 23 of the Act of 1902 the Board of Education have further powers as to holding public inquiries. It is not necessary to consider under which section the inquiry held by Mr. Hamilton or the duty of the Board of Education to determine the question arose; it seems to us clear that under one or other of the sections to which we have referred the duty lay upon the Board of Education to determine the matter in dispute, and that, if they have failed to determine it, a writ of

mandamus could be issued to compel them to determine it; and if they have made an order beyond their jurisdiction, certiorari will lie to quash the order.

There still remains to be considered the important point raised by Sir D. Brynmor Jones before Mr. Hamilton and by the learned Solicitor-General before us, that the Act of 1902 permits a local education authority to discriminate in the matter of salaries between provided and non-provided schools, and to apply to the same class of teachers in the non-provided schools a different and lower scale of remuneration than that which they allow in the provided schools. We asked the learned Solicitor-General in the course of his argument to point out any provision or language in the Act of 1902 which justified such a contention; his only reply was that he found nothing to the contrary, and that he contended the right of the local authority to discriminate was absolute and uncontrolled, except that they must maintain the same standard of efficiency in schools of the same class, whether provided or non-provided. In our opinion this argument is wholly insufficient, and a consideration of the purview and object of the Act of 1902 shews conclusively that it is ill-founded. That Act for the first time placed the voluntary or non-provided schools under the control (subject to the provisions of the Act) of the local education authorities, and gave the non-provided schools assistance from the rates; by s. 5 it transferred to the local education authority the powers and duties of the school boards and school attendance committees, and made them responsible for and gave them the control of all secular instruction in public elementary schools not provided by them; s. 6 enacted that all public elementary schools, with certain exceptions in the case of boroughs, should have a board of managers with certain powers; s. 7 provided that the local education authority should maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure for that purpose other than the expenditure for which provision is to be made by the managers; and by sub-s. (*a*) of the same section it is provided that the managers shall carry out any directions of the local education authority as to secular instruction, including

1909

REX v. BOARD OF EDUCATION.

Lord Alverstone C.J.

any directions with respect to the number and educational qualifications of the teachers to be employed.

We do not think it necessary to read at length the other provisions of the same section or other sections of the Act, but it appears to us to be beyond all question that the Legislature intended that, from the point of view of the teachers, their salaries and their qualifications in provided and non-provided schools were to be treated alike, and that there is not the slighest justification for any claim by a local education authority to differentiate between the scale of salaries allowed to the same class of teachers in provided as compared with the non-provided schools. In our judgment the opinion expressed by the Board of Education on July 31, 1906, was strictly in accordance with the law, and it is not immaterial to observe that Mr. Hamilton stated that the local education authorities throughout the country paid teachers in the two classes of schools (provided and non-provided) on the same scale, and, except in the case of the boroughs of Halifax and Swansea, they did not discriminate between teachers in provided and non-provided schools as such. Not the slighest attempt was made in the argument before us to shew that that statement was not strictly accurate. The same view of the Act was expressed by Sir J. Lawson Walton when Attorney-General in arguing the *West Riding Case* in the House of Lords (1), and is, we think, involved in the judgment of the House, and particularly the judgment of Lord Davey at pp. 38 and 39. Be that as it may, we hold that a local education authority have no power under the Act of 1902 to differentiate in the matter of teachers, equally qualified and teaching the same subjects, between the salaries paid in provided and non-provided schools as such.

We have now to consider the decision of the Board of Education and the contention on behalf of the school managers that it is beyond their jurisdiction and ought to be quashed. We need scarcely say that, if the contention of the learned Solicitor-General, that they have only gone wrong on a matter of law within their jurisdiction, was correct, no writ of certiorari can issue. The determination, if any, of the Board of Education

(1) [1907] A. C. 29, at pp. 30, 31.

upon this part of the case is to be found in the last paragraph of the decision, in which the Board of Education state that there is no statutory right on the part of the managers of any particular school to receive from the authority any particular scale of salaries, that that is a matter entirely for the authority, and they decide that the authority have not failed in their duty to keep efficient the Oxford Street school. This decision rests entirely upon the statement contained at the commencement of the fourth paragraph of the decision, that the true question at issue between the authorities and the managers was whether competent teachers could be procured for the Oxford Street Church of England school at the scale of salaries to which the local education authority consented in their letter of April 18, 1907; this, as already stated, was the letter in which the local authority only consented to pay the salaries existing at the time of the transfer, or, in other words, they insisted on their right to differentiate in the matter of salaries between provided and non-provided schools.

In our judgment the Board of Education have not only not decided the question submitted to them, but have raised and made an order upon a matter never submitted to them, namely, whether teachers could be procured for a particular non-provided school at a lower rate of salary than that paid to the same class of teachers in the provided schools; or, in other words, they have given themselves jurisdiction to determine the question in favour of the local authority by changing the question submitted to them into the one which we have quoted, and by misconstruing the Act of Parliament so as to enable themselves to decide a question not raised before them, and in our opinion not open to them. No one has ventured to say that the schools of the same class would not be injured if, the subjects taught being the same, teachers of equal qualifications and teaching the same subjects receive higher salaries in one school than the other; the better teachers must be attracted to the school in which higher salaries are paid, and we adopt as our own the reason stated by Mr. Hamilton in paragraph 15: "The discrimination against the teachers in the Oxford Street school unsettles the teachers, leads them to seek other posts with better

1909

REX v. BOARD OF EDUCATION.

Lord Alverstone C.J.

pay and less uncertain prospects, harasses them in their work, and deprives the school of the benefit of length of service and growth of experience in its teaching staff. The matter did not rest on opinion only, for evidence was given before me of the actual feeling of the teachers, and it was proved that while there was a waiting list of applicants for posts in the provided schools so that vacancies were filled without advertisements, vacancies in the Oxford Street school were filled, if at all, only with difficulty and delay."

Our attention was called to a judgment of Channell J. in the case of *Wilford* v. *West Riding of Yorkshire County Council* (1), in which will be found some very useful observations as to the duty of the Board of Education under the Act.

One further important point requires consideration. The Board of Education in their decision say that the speculation as to the future efficiency of the school ought not to prevail against the judgment of the local authority that the school could in fact be maintained in a state of efficiency on the rates of pay which they were willing to provide. We inquired to what the expression "the judgment of the local authority" referred, and it was agreed that the only judgment was the determination of the local authority to pay in the case of the non-provided schools the same rate of salaries as those hitherto paid. No reasons are anywhere given as to the grounds for this determination. Had there been a reasoned judgment of the local authority upon this point, concurred in by the Board of Education, different questions might have arisen, but the decision of the Board of Education not only changed the question which had arisen between the managers and the local authority, but put the onus of proof upon managers to shew that the decision of the local education authority to discriminate was unjust, which is clearly wrong.

In our judgment the decision of the Board of Education as embodied in the letter of December 17, 1908, was made without jurisdiction, and was only possible by a disregard of the duties of the local education authority under the Act of 1902. The case with regard to mandamus is even clearer. We have pointed

(1) [1908] 1 K. B. 685.

out that, apart from questions of structure, the one important point in dispute between the managers and the local education authority was the right claimed by the local education authority to insist on paying the teachers in the non-provided schools the old scale of salaries only, while they were fixing for similar teachers in similar subjects in provided schools higher and more liberal terms—in other words, the right to differentiate in the matter of salaries between provided and non-provided schools as such. This question, which was the real question in dispute, has never been determined by the Board of Education. On the face of their decision they have changed that matter of dispute into another question and have decided an entirely different issue, namely, whether the managers could have procured some teachers for the Oxford Street school at the lower scale of salaries to which alone the local education authority would give their sanction. There is no suggestion in any affidavit before us that there were special circumstances in connection with the Oxford Street school which justified a lower scale of salaries beyond the fact that it was a non-provided school.

For these reasons we are of opinion that both the rules should be made absolute with costs.

DARLING J. read the following judgment:—I agree that these rules should be made absolute, but with regret, for the conduct of a public department is here in question. After the statement of the facts of this case in the judgment of the Lord Chief Justice it is unnecessary to repeat them. Suffice it to say that, differences having arisen between the local education authority of Swansea and the managers of the Oxford Street school there, a public inquiry was held by Mr. J. A. Hamilton, K.C. (now Hamilton J.), and a report was made by him to the Board of Education. That report, and also the evidence on which it is founded, together with the arguments of the learned counsel who appeared for either party, is before this Court. From these proceedings it is manifest that the local education authority persistently claimed the right to discriminate between the financial support they should afford to provided and that due to non-provided schools. The Board of Education had thereupon

1909

REX v. BOARD OF EDUCATION.

Darling J.

been appealed to, and as far back as July 31, 1906, had written to the local education authority in these terms: "The Board of Education are not aware of any circumstances which would justify a differentiation in the salaries paid to teachers in voluntary and in council schools. They feel that the present uncertainty is unjust to teachers and is greatly imperilling the efficiency of the schools." It having been in this authoritative manner pointed out that the efficiency of the Oxford Street school was being imperilled, the local education authority merely continued on their course, and indeed further accentuated the differentiation they had instituted to the disadvantage of the non-provided school. Had they designed to degrade and disorganize that school, they could have taken no more likely means to that end than those dictated to them by their sense of public duty. The position became intolerable, and, therefore, by direction of the Board of Education, in July and August, 1908, the inquiry of Mr. Hamilton was held. The attitude then adopted and still maintained by the local education authority is clearly defined in the following passages from the speech of their counsel, Sir D. Brynmor Jones, K.C.:—"The authority contends that it has the right under this statute to control public elementary education in the borough without interference from the Board of Education and without interference from the managers. It is on the local authority that Parliament has devolved these powers, and it is neither matter for complaint by the managers nor by the Board of Education that in the exercise of its powers it has not kept the level of elementary education in the borough at such a high state of efficiency as the Board of Education thinks fit, or the managers of an individual school may think fit, when it has no evidence at all of a failure in the performance of its duty by the local education authority. I should be very sorry indeed to think that this authority refused to spend money in keeping up the schools in this borough at a high level of excellence. But even supposing they did, after all, it is the ratepayers of this borough who have to pay for the maintenance of these schools, and they have the obligation to pay out of their own pockets for that. It is for the representatives of the ratepayers (subject always to the law) to say what kind of schools

they will have, and what kind of education they choose to give to the children of the ratepayers of the borough. So much for the status of the authority. . . . . Control necessarily means differentiation. There is no special kind of differentiation forbidden in any of the Acts of Parliament, and in differentiating as mere matter of law the authority is acting within the power which is given to it by the Act of Parliament. So much for the differentiation." The admirable letter of the Board of Education, dated July 31, 1906, was further characterized as "a distinct usurpation of authority on the part of the Board of Education."

At the inquiry no evidence was tendered on behalf of the local education authority, and upon the uncontradicted evidence called for the non-provided school Mr. Hamilton reported as follows: "The Oxford Street school has regularly earned the grant and to that extent has been maintained and kept efficient, but this has been done, not by the authority alone, but only by the combination of funds provided by the authority and of funds collected by the managers 'other than expenditure for which,' under the Education Act, 1902, 'provision is to be made by the managers.' But for these sums provided by the managers, in my opinion the school would before now have ceased to be efficient in any sense. As it is, though it continues in a state of efficiency by earning the grant, its efficiency is, owing to the course taken by the authority, precarious. It is further jeopardized by the departure of experienced teachers and by the dissatisfaction and unrest created among those who remain. In paying the salaries for which the teachers pressed, the managers have neither played into the teachers' hands nor acted improvidently. They would have kept up the efficiency of the school without paying more than the authority fixed, if they could, but it was not practicable to keep the staff together or to obtain a staff capable of keeping the school efficient unless they paid higher salaries than those which the authority fixed." Mr. Hamilton's report was considered by the Board of Education, both with regard to the facts and the law, and their secretary wrote thus to the local education authority: "The Board have carefully considered

1909

REX v. BOARD OF EDUCATION.

Darling J.

Mr. Hamilton's report, together with the evidence tendered before Mr. Hamilton at the inquiry, and have taken legal advice thereon. The true question at issue between the authority and the managers is one of fact, namely, whether competent teachers can be procured for the Oxford Street Church of England school at the scale of salaries to which the local education authority consented in their letter of April 18, 1907; if they can, it appears to the Board that these sums paid by the local education authority are adequate for the purpose of maintaining the school and keeping it efficient; if not, then the local education authority have failed in their statutory duty. The Board are of opinion that no sufficient evidence has been adduced to prove that the authority have so failed, and they see no substantial grounds for supposing that the task of the managers in procuring teachers at the scale of salaries to which the local education authority consented in their letter of April 18, 1907, was an impossible one, or that they could not have filled any such vacancies as occurred or might occur at that scale if they had determined so to do. It is suggested that the future efficiency of the school would be imperilled by the employment of teachers at the lower rate of pay, but this is a somewhat remote speculation, and ought not, in the view of the Board, to prevail against the judgment of the local authority that the school can in fact be maintained in a state of efficiency on the rates of pay which they are willing to provide. There is no statutory right on the part of the managers of any particular school to receive from the authority any particular scale of salaries for their teachers. That is a matter entirely for the authority which controls the expenditure, subject only to the obligation to give such salary as will procure teachers capable of keeping the school efficient. The contention of the authority that the only question arising here is one of control of expenditure does not adequately indicate the whole point at issue. The crucial question is whether their proposed expenditure is adequate for the performance of their statutory obligation. As already stated, the Board do not find upon the evidence that the money provided by the authority for the salaries of the teachers has been shewn to be inadequate for this purpose, and they decide accordingly that the authority

have not failed in their duty to maintain and keep efficient the Oxford Street school."

I am of opinion that the Board of Education have not heard and determined the matter submitted to them according to law. They have apparently adopted the contention of Sir D. Brynmor Jones as to the meaning of their obligation to keep efficient the schools under their control, an argument stated and dealt with by Mr. Hamilton in these words: "It is due to the able and distinguished argument of Sir David Brynmor Jones that, as I am unable to agree with it, I should state in some detail why I disagree. (1.) The statutory requirement is not satisfied by the mere fact that the school has been maintained and has been kept efficient; it must be maintained and kept efficient by the local education authority. The Oxford Street school has not been maintained and kept efficient by the local education authority, but in so far as it has been maintained and kept efficient, this is due to the combined acts and outlays of the authority and of the managers. (2.) Evidence that the managers, in paying salaries in excess of those fixed by the authority, had acted unreasonably and without necessity, would have been very material, but no such evidence was given. The witnesses for the managers stated that they had no wish to spend more than was necessary, and would have been willing to engage teachers at the authority's scale of pay, if it had been possible to do so without imperilling the efficiency of the school, and I accept their statements. (3.) Further, I doubt if the earning of the grant from time to time is conclusive upon the question of a school's efficiency. The efficiency so evidenced may be precarious. The maintenance of a school involves not merely its attainment of a present standard, but its preparation to do so in the reasonably near future. It seems to me that the way in which the authority's policy caused dissatisfaction among the staff jeopardized the continuance of successful teaching to an extent which reduced the efficiency of the Oxford Street school to an uncertain temporary efficiency, only ascertainable ex post facto." I think the Board of Education have not rightly understood what is the obligation imposed by statute upon the local education authority. The statute is, in my opinion, rightly interpreted by Mr.

1909

REX v. BOARD OF EDUCATION.

[Darling J.

Hamilton when he says: "What, in my opinion, the section means is that the authority must keep the school efficient and are not merely to hand over to others, in gross, money enough for the purpose, but to control the expenditure and see that the expenditure is effective by causing the school to be efficient. I can find nothing in the section which leads to the inference that the discrimination, which is involved in control, is not one which may be criticized, or that the control is one which cannot be questioned, or that managers, who by statute participate with the authority in part at least of the joint executive act of administering a public elementary school, are persons who may not criticize that control, or that their criticism is something which cannot raise a question under this section." It would appear from the last paragraph of the letter of the Board of Education that in their opinion the local authority have discharged their statutory duty unless the amount provided by them to pay salaries in the non-provided schools is distinctly proved to be inadequate. But the Board of Education do not find, or affect to find, that the amount allowed is enough in fact to maintain efficiency; yet unless it be so the duty of the local authority is not fulfilled.

Clearly, upon the evidence given, the Board could not find that affirmative evidence had established this proposition, for all the evidence was to the contrary effect. It is to be observed that the Board of Education give no reasons for coming to a conclusion on the evidence contrary to that arrived at by Mr. Hamilton, and I should have much liked to see them.

In my opinion the Board of Education have not rightly regarded the question before them, have not found as a fact that which was necessary in order to establish that the local education authority were not in default, or, if they indeed intended to find that the facts prove this, then they have done so without any evidence whatever.

A. T. LAWRENCE J. read the following judgment:—I am of the same opinion. The question in dispute is a difference between the Swansea local education authority and the managers of a non-provided school within their area called the Oxford Street

school. The Oxford Street school is a large elementary Church of England school within the county borough of Swansea. The difference in question, which I gather from the shorthand note is one of several that have occurred between the same parties, relates to the salaries paid to the teachers in non-provided schools within this school area. The local education authority have, since the Act of 1902 came into force, refused to sanction any increase in the salaries of teachers in non-provided schools. They have increased substantially the salaries of teachers in provided schools and have framed a table by which certain increments of salary accrue to those teachers. They decline to apply this scale of remuneration to the teachers in non-provided schools and claim to be entitled to discriminate between schools according as they are provided schools or non-provided schools. This does not purport to be done on educational grounds, or on any ground other than that the schools are non-provided schools. The question in dispute was whether the local education authority had or had not the right to discriminate in this way between the two kinds of school. They did not suggest any facts or circumstances in regard to either the teachers or the schools upon which this discrimination was based. They simply took up the position that these were the salaries paid before this Act was passed and that they would pay no more; they claimed the right so to treat them. This, besides being untenable in law, is unjust in fact, for all persons contribute to the rates which the authority administer, whatever their denominational views. The Oxford Street school is a striking instance, because it is one of the largest schools in their district and is in a populous part of the town. The managers of the school lodged a complaint with the Board of Education. The Board directed a public inquiry and requested Mr. J. A. Hamilton, K.C., to hold it. The local education authority admitted the facts above stated, called no evidence themselves, but contended in a lengthy speech by counsel that they had the right to do what they had done, and that the Board of Education had no jurisdiction to interfere with or review their administration of their funds. Mr. Hamilton reported that the local education authority had made default in the performance of their duty to maintain and

1909

REX v. BOARD OF EDUCATION.

A. T. LAWRENCE J.

keep efficient the Oxford Street school. The Board of Education afterwards issued its decision in the shape of a letter to the local education authority, in which they decide "that the authority have not failed in their duty to maintain and keep efficient the Oxford Street school." This is the decision which is called in question by the two rules nisi above mentioned.

The Board of Education, created by the Board of Education Act, 1899, is a statutory body consisting of a President and the principal members of the Government, and is "charged with the superintendence of matters relating to education in England and Wales." The Act of 1902, s. 7, sub-s. 3, gives the Board of Education power to determine any question which arises under the section between the local education authority and the managers of non-provided schools. At first sight it would seem that, however startling this decision of the Board may be, it is one within their jurisdiction, and consequently not capable of being quashed on certiorari. There is an affidavit too of Mr. Claud Schuster, an assistant secretary of the Board, which seeks to shew that the decision is one of fact only, and that of an administrative character. I have felt considerable difficulty in apprehending how this can be. I think it can only be explained by the suggestion of Sir Robert Finlay, made in supporting the rule. It is that the confusion flows from giving two different meanings to the words "maintain and keep efficient" in s. 7, the one applicable to provided schools, the other to non-provided schools; that the Board have considered they were concerned only with that degree of maintenance and efficiency which is needed in order merely to earn the Government grants, and that the Board have either assumed for the purposes of their decision that as a matter of law the local education authority had the right they claim to discriminate between the one class of school and the other class, or that they have not decided that question at all. I think this is the key to the puzzle. If you once assume that the local education authority have this right to discriminate, and that their power over the purse is uncontrolled, the finding of the Board of Education and the affidavit of Mr. Schuster become plain. It would then be a question of fact whether the school had continued capable of earning the grant,

and in that limited sense efficient, and it might be possible to say that the evidence before the commissioner did not demonstrate that it had not. If it does not mean this, I do not see how any one could say that the evidence before the commissioner did not amply support the finding which he based upon it. It seems to me impossible to "maintain and keep" the same standard of efficiency in two sets of men of equal attainments, doing equal work in schools in adjoining streets, if you refuse them the same salary; it is certainly impossible when, as here, many of them belong to the same teachers' union. To say it can be done is to ignore everyday experience and our common human nature. It becomes necessary, therefore, to consider the question whether this claim of the local education authority is well founded. It is an important question. The Act abolished school boards, made the council of a county borough the local education authority, and gave it the control of all expenditure. It seems to be suggested that this means that they can do as they please, and can be called to account by no one but a ratepayer of the borough. I think it means nothing of the kind. When a council is given a power by Act of Parliament it becomes bound to exercise the power with a single eye to the discharge of the duty created by the Act. The power must be exercised impartially. The Act, as has been pointed out in other cases, aimed at improving the standard of education throughout the country, and whether children go to a Church school or another, their secular education should be the best that can be given under the circumstances. A local education authority has full power to consider the needs of each school, but that is not what it has done here. This authority has sought to provide a higher standard of efficiency in the one class of school than in the other. This is a flagrant breach of its duty. There is no colour of pretence for such power in the Act of Parliament. The words giving them the power and creating the duty are in the same section (7)—nay, more, they are the same words. The section says they "shall maintain and keep efficient all public elementary schools" and have "the control of all expenditure required for that purpose." It is inconceivable to me that any one should read those words

1909

REX v. BOARD OF EDUCATION.

A. T. LAWRENCE J.

as giving them authority to pick and choose among schools according as they are provided or non-provided, a matter which may have importance from some point of view, but which has nothing to do with efficiency. They think the higher salaries proper for the "purpose," for they have fixed them and pay them for that purpose; they must therefore think any less sum insufficient, which is exactly what the teachers maintain, and what the managers have had to submit to, and make themselves personally responsible for the difference between the two scales of salary. The claim of the authority is a claim to dispose of their funds as they please, and I cannot believe that the Board of Education, if they had considered this aspect of the case, could have intended to uphold the conduct of the authority. I am of opinion that both rules must be made absolute, the certiorari because the so-called decision does not decide the true question submitted, and the mandamus in order that the Board may hear and determine that question according to law.

LORD ALVERSTONE C.J. I think it right to say that we have none of us acted on, or taken into consideration in the least, the speeches made in Parliament. In fact I think my brothers, who were not parties to the rule being granted, never heard of them at all; and they certainly have not read them. I express no opinion as to whether in a proper case a statement of facts might be proved from speeches in Parliament, but we have not paid the slightest attention to any of the speeches which were referred to in the affidavits on which the rules were moved.

Rules absolute.

Solicitor for Board of Education: *Solicitor to the Treasury.*

Solicitors for Swansea Corporation: *Sharpe, Pritchard & Co., for John Thomas, Town Clerk, Swansea.*

Solicitors for Managers of Oxford Street School, Swansea: *Crawley, Arnold & Co., for Strick, Bellingham & Hanson, Swansea.*

F. O. R.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows:—

In the First Series,
[1909] 1 Ch. [1909] 2 Ch.

In the Second Series,
[1909] 1 K. B. [1909] 2 K. B. [1909] P.

In the Third Series,
[1909] A. C.

INDEX.

ABROAD—Workmen's compensation—Accident happening abroad—Jurisdiction - 61
See EMPLOYER AND WORKMAN. 1.

ACCIDENT—Motor omnibus—Negligence—Doctrine of "res ipsa loquitur" - - 652
See NUISANCE.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ACCOUNTS—Falsification of—Machine—Taximeter - - - - - - - 980
See CRIMINAL LAW. 5.

ACKNOWLEDGMENT—Specialty debt—Bond—Lost acknowledgment—Parol evidence—Onus of proof - - - 724
See LIMITATIONS.

ACTION—Crown, Privilege of—Foreshore—Action between subjects involving rights of the Crown—Right of Crown to transfer action to Revenue side 1
See CROWN.

—— Damages—Death of plaintiff's wife through eating food sold to him—Death no part of cause of action - - - 193
See DAMAGES.

—— Gaming in foreign country—Cause of action—Money lent for purpose of gaming - - - - - - 208
See GAMING.

ADJUDICATION—Proposal for a scheme—Debtor's application to expunge a proof dismissed—Costs - - - - 788
See BANKRUPTCY. 1.

ADMIRALTY.
See under SHIPPING.

ADMISSIBILITY—Evidence.
See under EVIDENCE.

ADVERTISEMENT HOARDINGS—Right to distrain—Fixtures - - - - - 344
See LANDLORD AND TENANT. 1.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGREEMENT.
See under CONTRACT.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

AIDING AND ABETTING—Motor car—Breach of statutory regulation—Mens rea—Negligence—Corporation - - 599
See MOTOR CAR. 1.

ANIMAL—Savage animal.
See under SAVAGE ANIMAL.

ANIMALS—Cruelty to.
See under CRUELTY TO ANIMALS.

APARTMENTS—Tenement wholly let out in—Owner—Agent to collect rents—Rateability—Representation of the people
See RATES. 625

APPEAL—County Court—Appeal to judge from registrar—Interlocutory application—Order - - - - - - - 30
See COUNTY COURT. 1.

—— Court of Criminal Appeal.
See under CRIMINAL LAW.

—— Sentence—Plea of guilty—Sentence quashed—Sentence in substitution 24
See CRIMINAL LAW. 1.

—— Service—Mayor's Court—Notice of appeal—Service on Sunday - - - 100
See MAYOR'S COURT.

—— Workmen's compensation—Decision of county court judge on preliminary question—Appeal to Court of Appeal—Jurisdiction - - - - - 274
See EMPLOYER AND WORKMAN. 9.

APPEARANCE—Summary jurisdiction—Summons—Appearance of defendant by counsel—Warrant to compel personal attendance of defendant - - 614
See JUSTICES. 2.

APPOINTMENT—Receiver.
See under RECEIVER.

ARBITRATION — *Arbitrator — Qualification—Arbitrator to be Member of Trade Association—Arbitrator not Member of Association—Estoppel.*
A contract, headed "London Corn Trade Association," for the sale by the defendant to the plaintiffs of a quantity of wheat contained a clause that all disputes from time to time arising out of the contract should be referred to two arbitrators, one to be appointed by each party, the two arbitrators having power to appoint a third, and "the arbitrators appointed shall be in all cases principals engaged in the corn trade as merchants, millers, factors, or brokers, and shall also be members of the London Corn Exchange, the Baltic, or the London Corn Trade Association, and residing in the United Kingdom." The clause also provided that either party if dissatisfied with the award might appeal to the committee of appeal elected for the purpose, who were to confirm the award unless four members of the committee decided otherwise. The committee of appeal consisted of five members. A dispute under the contract was referred to arbitration in accordance with the above clause, and the parties attended the arbitration proceedings, and the three arbitrators made an award in favour of the defendant, and the award was confirmed by the committee of appeal. Neither of the arbitrators appointed by the parties was a member of one or other of the three bodies above mentioned, but this fact was not known to the plaintiffs until after the award had been confirmed on appeal. The two arbitrators had, however, on many occasions acted as arbitrators under similar contracts containing a similar arbitration clause. The plaintiffs having brought an action for a declaration that the award was null and void :—
Held that, as the arbitrators were not qualified to act as arbitrators under the contract, they had no jurisdiction to determine the dispute, and the award was null and void ; and the plaintiffs were not estopped from relying upon the defect in the qualification of the arbitrator appointed by the defendant. JUNGHEIM, HOPKINS & Co. *v.* FOUKELMANN - - - **Pickford J. 948**

—— Jurisdiction of Railway and Canal Commission—Differences between railway companies - - - - - **670**
See RAILWAY. 1.

ARBITRATOR.
See under ARBITRATION.

ARMY ACT, 1881 — Attachment of debts — Garnishee order—Retired pay of officer in Army—Pension due but not paid—Bank crediting amount to customer
See ATTACHMENT. **1029**

ARRANGEMENT — Company — Arrangement with creditors — Judgment — Staying proceedings - - - - - **368**
See COMPANY.

ARREST—Railway company—Special constable—Arrest on suspicion of felony—Liability of company - - - **776**
See FALSE IMPRISONMENT.

ASYLUM—Lunacy.
See under LUNACY.

ATTACHMENT—*Practice—Attachment of Debts—Garnishee Order—Retired Pay of Officer in Army—Pension due but not paid—Bank crediting Amount to Customer—Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.
The defendant, who was a retired officer of the Army, was entitled to retired pay in respect of past services. The retired pay was payable quarterly, and on each occasion a form of pay warrant had to be filled in and signed by the defendant, which contained a declaration that he was entitled to retired pay at a certain rate for the last quarter, followed by the words "Received of H.M. Paymaster-General this day of , 190 , the sum of pounds, being the amount of retired pay due for the period stated in the above declaration." At the end of the form were the words "This receipt must be presented for payment by a London banker, but may be negotiated in the country or abroad, and is to be left by the banker at the Paymaster-General's office one day for examination." The defendant opened an account at a bank for the sole purpose of collecting his retired pay, no other moneys being paid into this account, and he drew against this account by cheques in the ordinary way. On January 1, 1909, a sum of 6*l.* 13*s.* 8*d.* was standing to his credit at the bank, this sum being the balance of the retired pay previously received by him from the Paymaster-General, and on that day a pay warrant in the form given above, duly filled in and signed, for the sum of 17*l.* 12*s.* 6*d.*, being the amount of his retired pay due to him on that day for the preceding quarter, was handed by him to the bank for collection, and the bank at once credited his account with the amount. On the same day, after the amount had been so credited, a garnishee order nisi was served on the bank, at the instance of a judgment creditor of the defendant, attaching all debts owing or accruing due from the bank to the defendant to answer the judgment debt. The pay warrant was paid by the Paymaster-General on January 7. The defendant contended that both the above sums were protected from execution by s. 141 of the Army Act, 1881 :—
Held, that the 6*l.* 13*s.* 8*d.* had lost its character of retired pay as it had been received from the Paymaster-General at the time when the garnishee order was served, and was therefore liable to attachment ; and that the 17*l.* 12*s.* 6*d.* was not liable to attachment, notwithstanding that the amount had been placed by the bank to the defendant's credit, as it retained its character of retired pay until it had been paid by the Paymaster-General. JONES & Co. *v.* COVENTRY - - **Div. Ct. 1029**

ATTENDANCE — Summary jurisdiction — Summons — Appearance of defendant by counsel—Warrant to compel personal attendance of defendant - - **614**
See JUSTICES. 2.

BAILIFF—Execution—Deposit of value of goods — Bailiff remaining in possession — Right to possession fees - - **384**
See COUNTY COURT. 2.

BANK.
See under BANKER.

BANKER—*Cheque—Cheque drawn by Directors on behalf of Company—Forgery—Negligence—Return of Pass-book without Objection—Settled Account.*

It is the duty of a customer of a bank in issuing mandates to the bank to take reasonable care so as not to mislead the bank ; but, beyond the care which must be taken in or immediately connected with the transaction itself, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants.

The mere fact that a customer of a bank takes his pass-book out of the bank and returns it without objecting to any of the entries contained therein, there being a pencil entry of the balance, does not amount to a settlement of account as between him and the bank in respect of those entries.

The secretary of a company forged the signatures of two of the directors of the company to a number of cheques which purported to have been drawn by the directors on behalf of the company upon the defendants, who were the company's bankers, and the defendants paid the cheques so drawn. The forgeries extended over a period of about two months, during which time neither the bank pass-book nor the cash-book of the company was examined by the directors. In an action by the company against the defendants to recover the amounts so paid :—

Held, upon the facts, that the company was entitled to recover. KEPITIGALLA RUBBER ESTATES, LIMITED *v.* NATIONAL BANK OF INDIA, LIMITED - - **Bray J. 1010**

—— Retired pay of officer in Army—Pension due but not paid — Bank crediting amount to customer—Attachment of debts—Garnishee order - - **1029**
See ATTACHMENT.

BANKRUPTCY—*Costs—Proposal for a Scheme—Debtor's Application to expunge a Proof dismissed—Adjudication — Practice — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 105 ; *Sched. II., r.* 25.

Where, after a receiving order, the debtor carries a composition or scheme, and any applications by him to expunge proofs are dismissed with costs, he must pay such costs in addition to what he pays under the composition or scheme. But if he fails to carry the composition or scheme and is adjudicated a bankrupt, such costs, not being a debt provable in the bankruptcy, are not payable out of the estate and remain a debt enforceable against him after his discharge. *In re* PILLING - - - **Phillimore J. 788**

2. —— *Costs in Divorce Court—Order to pay—Default—Judgment Summons—Receiving Order in lieu of Committal—Practice—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 103, *sub-s.* 5.

The debtor, as the co-respondent to a husband's petition in the Divorce Court, was ordered to pay the petitioner's costs of the suit, which were subsequently taxed at 110*l.* 7*s.* 10*d.* The debtor was then ordered to pay the 110*l.* 7*s.* 10*d.* by a specified date to the petitioner's solicitors, but did not comply with the order, whereupon the solicitors issued against him a debtors' summons under the Debtors Act, 1869, at the hearing of which there was evidence that he had means to pay :—

Held, that there was jurisdiction under s. 103 of the Bankruptcy Act, 1883, to make a receiving order against the debtor. *In re* HALLMAN. *Ex parte* ELLIS & COLLIER - **Phillimore J. 430**

3. —— *Judgment Summons by Married Woman—Judgment Debtor a Creditor—Costs in Bankruptcy—Set-off—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

A creditor of a married woman obtained judgment against her separate estate in respect of a debt of over 50*l.* incurred by her whilst trading. Shortly before the date of the judgment she sold her business. He presented a bankruptcy petition against her based on his judgment debt, but the petition was dismissed with costs, as the evidence failed to establish the act of bankruptcy alleged. She then obtained an order in the Bankruptcy Court for payment by him of her taxed costs of the petition, which he did not comply with. Thereupon she took out a judgment summons against him under s. 5 of the Debtors Act, 1869, for not complying with the order. He had means to pay :—

Held, that the Court had no jurisdiction to set off his judgment debt against her taxed costs of the petition. *In re* DRUMMOND. *Ex parte* ASHMORE - - - - **Phillimore J. 622**

4. —— *Liquidation by Arrangement — Trustee in Liquidation—Joint Trustees—Surviving Trustee—Close of Liquidation—Transfer of Assets to Official Receiver—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 125—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 159, 160, 161—*Bankruptcy (Discharge and Closure) Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 3, *sub-s.* 1.

Where two persons are appointed joint trustees in a liquidation by arrangement under s. 125 of the Bankruptcy Act, 1869, and one of them dies, the survivor continues to be trustee in the liquidation.

Sect. 3, sub-s. 1, of the Bankruptcy (Discharge and Closure) Act, 1887, does not apply to a liquidation by arrangement under the Bankruptcy Act, 1869, so as to close the liquidation and vest the property of the liquidating debtor in the official receiver. *In re* W. W. BARTON. TOMLINS *v.* LATIMER - - - **C. A. 841**

5. —— *Receiving Order — Practice — Proposal for a Composition rejected by the Creditors—Debtor's Application to expunge a Proof—Locus standi of Debtor—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II., r.* 25—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 3.

Rule 25 in Sched. II. to the Bankruptcy Act,

BANKRUPTCY—*continued.*
1883, which empowers the Court to expunge or reduce a proof, in the case of a composition or scheme, upon the application of the debtor, means a composition or scheme that is pending before the Court, i.e., that has been accepted by the creditors.

As a general rule, therefore, a debtor has no locus standi to apply to expunge or reduce a proof either before his proposal for a composition or scheme has been accepted by the creditors or after it has been rejected, but the Court may in exceptional circumstances—as in *Ex parte Bluck*, (1887) 4 Morr. 273—entertain such an application. *In re* BENOIST - **Phillimore J. 784**

BEERHOUSE—Non-renewal of licence—Lease—Impossibility of performing covenant—Continuance of lease—Compensation. *See* LANDLORD AND TENANT. 4. **740**

BILL OF LADING—Ship.
See under SHIPPING.

BILL OF SALE—*Validity—Form in Schedule, Deviation from—Condition for Defeasance of Security—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-s.* 3—*Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 8, 9.

At the time of the giving of a bill of sale as security for an advance, and before the completion of the transaction, the grantee handed to the grantor a card on which were printed certain conditions, which a jury found were made part of the bargain before the money was lent. One of the conditions was to the effect that borrowers were strictly prohibited from obtaining or endeavouring to obtain money from any other loan office until the account was paid; otherwise they would be liable for the full amount to be called in, as though an instalment had been missed. This condition was not inserted in the bill of sale, which otherwise was in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882:—

Held that, as the condition was not inserted in the bill of sale, and would have avoided it if it had been inserted, the bill of sale was not in accordance with the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882; that it was therefore absolutely void under s. 9 of that Act, and the grantor's covenant for payment of interest was consequently not enforceable by the grantee. SMITH *v.* WHITEMAN **C. A. 437**

—— Money-lender—Business carried on at other than registered address — Illegality—Bill of sale invalid - - - **353**
See MONEY-LENDER.

BOARD OF EDUCATION.
See under SCHOOLS.

BOARD OF TRADE—General annual report of—Libel—Absolute privilege - - **306**
See DEFAMATION. 1.

BOARD OF WORKS—Consent—General line of buildings in street—Buildings erected beyond the general line - - **317**
See LONDON. 2.

BOND—Specialty debt—Lost acknowledgment—Parol evidence—Onus of proof - **724**
See LIMITATIONS.

BUILDING—Conversion of building into dwelling-house—"New building"—Breach of by-law - - - - - - **257**
See LOCAL GOVERNMENT. 1.

—— General line of buildings in street—Buildings erected beyond the general line—Consent - - - - **317**
See LONDON. 2.

—— London—Building notice—School—Local education authority—Obligation to serve notice - - - - - **138**
See LONDON. 1.

—— Persons altering drains—By-laws—Liability of agents carrying out work - **265**
See LONDON. 3.

BREACH OF COVENANT.
See under COVENANT.

BREAD—*Sale of, otherwise than by Weight—"Fancy Bread"—Bread Act*, 1836 (6 & 7 *Will.* 4, *c.* 37), *s.* 4.

To constitute bread "fancy bread" within the proviso to s. 4 of the Bread Act, 1836, it is not necessary that it should be superior in quality to ordinary household bread; it is enough that it is so different in size and appearance as not to be liable to be mistaken for it. BAILEY *v.* BARSBY - - - - - **Div. Ct. 610**

BREWERY—Income tax—Deductions—Profits of brewery—Tied licensed houses—Compensation charge - - - **912**
See REVENUE. 3.

BY-LAW—Building—Conversion of building into dwelling-house—"New building"—Breach of by-law - - - **257**
See LOCAL GOVERNMENT. 1.

—— Buildings—Persons altering drains—By-laws—Liability of agents carrying out work - - - - - - - **265**
See LONDON. 3.

—— Lodging-house — Cleansing — Duty on "landlord"—Validity of by-law - **127**
See LONDON. 4.

CANAL—Railway—Arbitration—Jurisdiction of Railway and Canal Commission - **670**
See RAILWAY. 1.

CANCELLATION—Ship—Charterparty—"Ready for loading"—Discharge of previous cargo - - - - - - - **929**
See SHIPPING. 8.

CAR—Motor car.
See under MOTOR CAR.

CARRIAGE—Contract of—Ship—Passengers' luggage—Theft by shipowners' servants
See SHIPPING. 4. **987**

CARRIER — *Tramway Company — Common Carrier of Passengers—Negligence — Liability*

CARRIER—*continued.*

for Personal Injuries—Special Condition limiting Liability.

A municipal corporation owned a tramway constructed under statutory powers. In accordance with a statutory requirement they exhibited in a conspicuous place in their tramcars a list of the fares to be exacted, and they appended thereto a special notice to passengers stating, as the fact was, that the fares charged were less than the maximum authorized charges, and that in consideration thereof a passenger was only carried on the terms that the maximum amount recoverable from the corporation on account of any injury suffered by a passenger and for which the corporation were legally liable was 25*l.* :—

Held, affirming the decision of Lord Coleridge J. (by Cozens-Hardy M.R. upon the construction of the statutes regulating the tramway, by Farwell L.J. upon the ground that the corporation were common carriers of passengers at common law in the sense that they were bound to carry according to their profession, and by Kennedy L.J. upon both grounds), that, so long as the tramway was open for public traffic, the corporation were bound to carry any passenger, not being an objectionable person, who offered himself and was willing to pay the published fare, provided they had accommodation for him, and were not entitled to impose a condition limiting their liability for negligence without giving the passenger the option of travelling at a higher fare without any such condition.

Semble per Cozens-Hardy M.R. and Farwell L.J.: If the corporation published alternative lists of fares, one containing the maximum rates, and the other containing reduced rates, and gave an option to the passenger to pay either the full rate without any condition limiting their liability or the reduced rate with such a condition, a passenger electing to pay the smaller rate would be bound by the condition. CLARKE *v.* WEST HAM CORPORATION - **C. A. 858**

CASES :—

—— *Baker* v. *Bolton* - (1808) 1 Camp. 493
Considered and distinguished by C. A. JACKSON *v.* WATSON & SONS **[1909] 2 K. B. 193**

—— *Barron* v. *Willis* - - [1899] 2 Ch. 578
Approved by C. A. HOWES *v.* BISHOP **[1909] 2 K. B. 390**

—— *Bluck, Ex parte* - (1887) 4 Morr. 273
Discussed by Phillimore J. *In re* BENOIST - - **[1909] 2 K. B. 784**

—— *Chislett* v. *Macbeth & Co.*, [1909] 2 K. B. 36.
Reversed by C. A. **[1909] 2 K. B. 811**

—— *Corbett* v. *Pearce* - [1904] 2 K. B. 422
Overruled by C. A. CHISLETT *v.* MACBETH & Co. - **[1909] 2 K. B. 811**

—— *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Commissioners*, [1909] 1 K. B. 737.
Affirmed by C. A. - **[1909] 2 K. B. 604**

CASES—*continued.*

—— *Darby* v. *Harris* - (1841) 1 Q. B. 895
Approved and followed by C. A. PROVINCIAL BILL POSTING COMPANY *v.* LOW MOOR IRON COMPANY **[1909] 2 K. B. 344**

—— *Gardner* v. *Trechmann*, (1884) 15 Q. B. D. 154.
Distinguished by C. A. REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB - - **[1909] 2 K. B. 998**

—— *Hanrahan* v. *Leigh-on-Sea Urban Council*, [1909] 1 K. B. 263.
Affirmed by C. A. - **[1909] 2 K. B. 257**

—— *Hertfordshire County Council* v. *Great Eastern Ry. Co.*, [1909] 1 K. B. 368.
Affirmed by C. A. - **[1909] 2 K. B. 403**

—— *Holmes* v. *Millage* - [1893] 1 Q. B. 551
Followed by C. A. EDWARDS & Co. *v.* PICARD - - **[1909] 2 K. B. 903**

—— *Huguenin* v. *Baseley* - (1807) 14 Ves. 273
Discussed by C. A. HOWES *v.* BISHOP **[1909] 2 K. B. 390**

—— *Joseph Thorley, Ld.* v. *Orchis Steamship Co.*, [1907] 1 K. B. 660.
Considered and applied by Pickford J. INTERNATIONALE GUANO EN SUPERPHOSPHAATWERKEN *v.* ROBERT MACANDREW & Co. - **[1909] 2 K. B. 360**

—— *London County Council* v. *Metropolitan Ry. Co.*, [1909] 1 K. B. 116.
Reversed by C. A. **[1909] 2 K. B. 317**

—— *Mangena* v. *Edward Lloyd, Ld.*, (1908) 98 L. T. 640.
Followed by Phillimore J. MANGENA *v.* WRIGHT - **[1909] 2 K. B. 958**

—— *Moulis* v. *Owen* - - [1907] 1 K. B. 746
Discussed by C. A. SAXBY *v.* FULTON **[1909] 2 K. B. 208**

—— *Mountain* v. *Parr* - [1899] 1 Q. B. 805
Applied by C. A. SUTTON *v.* GREAT NORTHERN RAILWAY COMPANY **[1909] 2 K. B. 791**

—— *Murtagh* v. *Barry*, (1890) 24 Q. B. D. 632
Approved and followed by C. A. DEAN *v.* BROWN - - **[1909] 2 K. B. 573**

—— *Pederson* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267.
Distinguished by C. A. REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB - - **[1909] 2 K. B. 998**

—— *Pitts* v. *Michelmore* - [1909] 1 K. B. 227
Affirmed by C. A. - **[1909] 2 K. B. 244**

—— *Quarrier* v. *Colston* - (1842) 1 Ph. 147
Followed by C. A. SAXBY *v.* FULTON **[1909] 2 K. B. 208**

—— *Read* v. *Price* - - [1909] 1 K. B. 577
Affirmed by C. A. - **[1909] 2 K. B. 724**

CASES—*continued.*

—— *Rederiactieselskabet "Superior"* v. *Dewar & Webb* - - - [1909] 1 K. B. 948
Affirmed by C. A. - [1909] **2 K. B. 998**

—— *Reg.* v. *Middlesex Justices*, (1848) 17 L. J. (M.C.) 111.
Followed by Div. Ct. MILCH *v.* FRANKAU & Co. - [1909] **2 K. B. 100**

—— *Reg.* v. *Osman* - (1881) 15 Cox, C. C. 1
Ruling of Lush L.J. in, not followed by C. C. A. REX *v.* PERRY
[1909] **2 K. B. 697**

—— *Rex* v. *Davidson* - - [1909] W. N. 52
Overruled on one point by C. C. A. REX *v.* ETTRIDGE - - [1909] **2 K. B. 24**

—— *Roddam* v. *Morley*, (1857) 1 De G. & J. 1
Discussed by C. A. READ *v.* PRICE
[1909] **2 K. B. 724**

—— *Salisbury (Marquis of) and London and North Western Ry. Co., In re*, [1892] 1 Ch. 75, n.
Principle laid down in, followed by Phillimore J. *In re* DUKE OF NORTHUMBERLAND AND TYNEMOUTH CORPORATION - [1909] **2 K. B. 374**

—— *Scott* v. *Sampson* - (1882) 8 Q. B. D. 491
The common law as laid down in, not altered by Order XXXVI., r. 37, of the Rules of the Supreme Court, 1883. *Per* Phillimore J. MANGENA *v.* WRIGHT
[1909] **2 K. B. 958, 979**

—— *Senior* v. *Fountains & Burnley, Ld.*, [1907] 2 K. B. 563.
Applied by C. A. MCLEAN *v.* MOSS BAY IRON AND STEEL COMPANY
[1909] **2 K. B. 521**

—— *Singer Manufacturing Co.* v. *Clelland*, (1905) 42 Sc. L. R. 757.
Questioned on one point by C. A. OWNERS OF THE VESSEL TYNRON *v.* MORGAN - - [1909] **2 K. B. 66**

—— *Smith* v. *Lion Brewery Co.*, [1909] 1 K. B. 711.
Reversed by C. A. - [1909] **2 K. B. 912**

—— *Tasker* v. *Tasker* - - - [1895] P. 1
Observations of Sir F. Jeune P. on paraphernalia disapproved by C. A. MASSON, TEMPLIER & Co. *v.* DE FRIES
[1909] **2 K. B. 831**

—— *Tozeland* v. *West Ham Union*, [1907] 1 K. B. 920.
Distinguished by Bucknill J. CHING *v.* SURREY COUNTY COUNCIL
[1909] **2 K. B. 762**

—— *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas*, [1909] 2 K. B. 631.
Followed by C. A. CHARING CROSS, EUSTON AND HAMPSTEAD RAILWAY COMPANY *v.* BOOTS - [1909] **2 K. B. 640**

CASES—*continued.*

—— *Warnecken* v. *R. Moreland & Son, Ld.*, [1908] 1 K. B. 184.
Distinguished by C. A. TUTTON *v.* OWNERS OF STEAMSHIP MAJESTIC
[1909] **2 K. B. 54**

—— *Westminster Corporation* v. *Gordon Hotels, Ld.*, [1906] 2 K. B. 39.
Applied by Div. Ct. J. LYONS & Co. *v.* LONDON CORPORATION
[1909] **2 K. B. 588**
[Note. — *Westminster Corporation* v. *Gordon Hotels, Ld.*, [1906] 2 K. B. 39, was affirmed on another point in the Court of Appeal, [1907] 1 K. B. 910, and in the House of Lords, [1908] A. C. 142.]

CERTIORARI—Board of Education—Decision—Want of jurisdiction—Mandamus
See EDUCATION. **1045**

"CHARGES" — Ship — Charterparty — Lien — Demurrage payable day by day - **998**
See SHIPPING. 2.

CHARTERPARTY—Ship.
See under SHIPPING.

—— Shipbroker—Signature as agent—Right to sue as principal - - - - **549**
See PRINCIPAL AND AGENT.

CHEQUE.
See under BANKER.

CIVIL PROCEDURE ACT - - - - **724**
See LIMITATIONS.

CLEANSING—Lodging-house—Duty on "landlord"—Validity of by-law - - **127**
See LONDON. 4.

COAL MINES.
See under MINES.

COMMITTAL—Receiving order in lieu of—Costs in Divorce Court — Order to pay — Default—Judgment summons - **430**
See BANKRUPTCY. 2.

COMPANY—*Arrangement with Creditors—Judgment—Staying Proceedings — Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 120—*Stay of Execution.*

On an application by the defendant company under s. 120 of the Companies (Consolidation) Act, 1908, an order was made that meetings of the creditors and of the members of the company be summoned for the purpose of considering and, if thought fit, of agreeing to an arrangement proposed to be made between the company and its creditors and members. Before the meetings had been held, the company applied to the Court to grant a stay of execution on a judgment recovered by the plaintiff against the company previously to the making of the order summoning the meetings :—

Held, that there was no power to grant a stay of execution. BOOTH *v.* WALKDEN SPINNING AND MANUFACTURING COMPANY, LIMITED - - - - - **Div. Ct. 368**

COMPANY—*continued.*

—— Cheque drawn by directors on behalf of company — Forgery — Negligence — Return of pass-book without objection —Settled account - - - **1010**
See BANKER.

—— Libel—Absolute privilege—Official receiver in companies' liquidation — General annual report of Board of Trade - **306**
See DEFAMATION. 1.

—— Lottery—Offence—Corporation—"Person" **93**
See LOTTERY.

COMPENSATION—Lands Clauses Acts—Copyholds — Enfranchisement, Delay in—Interest—Quittances - - - **374**
See LANDS CLAUSES ACTS.

—— Licensing Acts.
See under LICENSING ACTS.

—— "Seaman" - - - - - - **811**
See MASTER AND SERVANT. 1.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPOSITION—Receiving order—Proposal for a composition rejected by the creditors —Debtor's application to expunge a proof—Locus standi of debtor—Costs
See BANKRUPTCY. 5. **784**

CONDITION—Bill of sale—Validity—Condition for defeasance of security - - **437**
See BILL OF SALE.

—— Ship — Contract of carriage —Passengers' luggage—Theft by shipowners' servants
See SHIPPING. 4. **987**

—— Tramway company — Common carrier of passengers—Negligence — Liability for personal injuries — Special condition limiting liability - - - **858**
See CARRIER.

CONSTABLE.
See under POLICE.

CONTRACT—Infant—Restraint of trade—Severable stipulations—Contract for benefit of infant—Injunction - - - **235**
See MASTER AND SERVANT. 2.

—— Insurance (Life)—Policy—Proposal basis of contract—Effect of absence of signed proposal—Estoppel - - - **288**
See INSURANCE (LIFE).

CONTRACT OF CARRIAGE—Passengers' luggage —Theft by shipowners' servants - **987**
See SHIPPING. 4.

CONTRACTOR—Workmen's compensation - **516**
See EMPLOYER AND WORKMAN. 15.

CONVEYANCING AND LAW OF PROPERTY — Lease — Forfeiture — Relief — Writ claiming possession—Election to determine tenancy—Underlease - - **894**
See LANDLORD AND TENANT. 3.

CONVEYANCING AND LAW OF PROPERTY—*continued.*

—— Lease—Mortgagor in possession—Breach of covenant to repair—Right of mortgagor to sue lessee - - - - **484**
See LANDLORD AND TENANT. 5.

CONVICTIONS — Cruelty to animals — Four animals — Information charging one offence—Four convictions—Validity
See CRIMINAL LAW. 2. **748**

COPYHOLDS — Compensation — Enfranchisement, Delay in—Interest—Quittances
See LANDS CLAUSES ACTS. **374**

CORPORATION—Liability for negligence—Obligation to maintain school premises—Injury to pupil caused by defect in asphalte of playground - - **762**
See NEGLIGENCE.

—— Lottery—Offence—"Person" - - **93**
See LOTTERY.

—— Motor car—Breach of statutory regulation —Mens rea—Negligence—Aiding and abetting - - - - - **599**
See MOTOR CAR.

COSTS—Divorce Court, Costs in—Order to pay —Default—Judgment summons - **430**
See BANKRUPTCY. 2.

—— Judgment summons by married woman— —Judgment debtor a creditor—Costs in bankruptcy—Set-off - - **622**
See BANKRUPTCY. 3.

—— Proposal for a scheme—Debtor's application to expunge a proof dismissed—Adjudication - - - - - - **788**
See BANKRUPTCY. 1.

—— Receiving order—Proposal for a composition rejected by the creditors—Debtor's application to expunge a proof—Locus standi of debtor - - - - **784**
See BANKRUPTCY. 5.

—— Taxation—Appearance by defendant in person—Subsequent employment of a solicitor—Irregularity - - - **341**
See PRACTICE.

COUNTY COUNCIL—Liability for negligence— Obligation to maintain school premises —Injury to pupil caused by defect in asphalte of playground - - **762**
See NEGLIGENCE.

COUNTY COURT—*Appeal to Judge from Registrar—Interlocutory Application—Order—Practice—County Court Rules*, 1903 *and* 1904, *Order XII., rr.* 9, 11.

By s. 74 of the County Courts Act, 1888, an action may by leave of the judge or registrar be commenced in the Court in the district of which the cause of action wholly or in part arose.

By Order XII., r. 9, of the County Court Rules, when the plaintiff has obtained leave so to commence an action in a Court distant more than twenty miles from the defendant's residence

COUNTY COURT—*continued.*

or place of business, the defendant may, within a certain time, forward by registered post letter to the registrar of the Court in which the plaint is issued an affidavit disclosing a good defence upon the merits to the action; and the registrar, if satisfied that the affidavit discloses such a defence, is directed forthwith by notice in the prescribed form to call upon the plaintiff to deposit in Court within a certain time such a sum as the registrar may, having reference to all the circumstances of the case, direct. Where the deposit is not duly made the action is to be struck out.

By Order XII., r. 11 (8.), of the County Court Rules, where any interlocutory application may be made to the registrar, and is so made, the judge may vary or rescind any order made by the registrar, and may make such order as may be just:—

Held, that the act of a registrar under Order XII., r. 9, in calling upon a plaintiff by notice to deposit a sum in Court is not an order within the meaning of Order XII., r. 11 (8.), and that the judge of the county court has no power to vary or rescind it. PORTER *v.* LONDON AND MANCHESTER INSURANCE COMPANY **Div. Ct. 30**

2. —— *Execution—Claim to Goods—Deposit of Value of Goods—Sum deposited less than Value—Bailiff remaining in Possession—Right to Possession Fees—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 156.

Goods which had been taken in execution under a county court judgment were claimed by a claimant. The execution creditor did not admit the claim, and the claimant deposited with the bailiff, under s. 156 of the County Courts Act, 1888, the sum of 26*l.*, which was considerably less than the value of the goods claimed, but was more than sufficient to cover the judgment debt and the costs of the execution. The money was paid into Court by the bailiff, who remained in possession of the goods, and an interpleader summons was issued. Before the return day of the interpleader summons the execution creditor gave notice that he admitted the title of the claimant to the goods, and the bailiff withdrew from possession. Upon the taxation of the costs the bailiff claimed possession fees up to the date when the execution creditor admitted the claimant's title, upon the ground that under s. 156 he was bound to remain in possession until the amount of the value of the goods was deposited with him:—

Held, that as the 26*l.* was deposited with and taken by the bailiff under s. 156 of the Act, he must be deemed to have taken it upon the assumption that it represented the amount of the value of the goods, and therefore he had no right to remain in possession or to possession fees after the date of the deposit. NEWSUM, SONS & CO., LIMITED *v.* JAMES - **Div. Ct. 384**

3. —— *New Trial—Jurisdiction of Judge to grant New Trial—Practice—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 93.

The power to grant new trials conferred upon the judges of county courts by s. 93 of the

COUNTY COURT—*continued.*

County Courts Act, 1888, is not an absolute power to be exercised upon any grounds which the judge may think fit, but is subject to the same limitations as to the grounds on which a new trial may be granted as are imposed upon judges of the Supreme Court.

Murtagh v. *Barry*, (1890) 24 Q. B. D. 632, approved and followed.

So *held* by Lord Alverstone C.J. and Farwell L.J. (Fletcher Moulton L.J. dissenting). DEAN *v.* BROWN - - - - - - - **C. A. 573**

—— Workmen's compensation—County court judge—Jurisdiction—Power to assess amount - - - - - - **77**
See EMPLOYER AND WORKMAN. 23.

—— Workmen's compensation — Decision of county court judge on preliminary question—Appeal to Court of Appeal—Jurisdiction - - - - - - **274**
See EMPLOYER AND WORKMAN. 9.

—— Workmen's compensation—Interrogatories — Discovery — Jurisdiction of county court judge - - - - - - **791**
See EMPLOYER AND WORKMAN. 14.

COUNTY COURT RULES, 1903 and 1904, Order XII., rr. 9, 11 - - - - - **30**
See COUNTY COURT. 1.

COURT OF CRIMINAL APPEAL.
See under CRIMINAL LAW.

COVENANT—Lease—Beerhouse—Non-renewal of licence—Impossibility of performing covenant—Continuance of lease - **740**
See LANDLORD AND TENANT. 4.

—— Lease—Mortgagor in possession—Breach of covenant to repair—Right of mortgagor to sue lessee - - - **484**
See LANDLORD AND TENANT. 5.

CREDITORS—Arrangement with—Company—Judgment—Staying proceedings - **368**
See COMPANY.

—— Bankruptcy.
See under BANKRUPTCY.

CREW—Ship—Agreement with crew—Stipulations contrary to law - - - **423**
See SHIPPING. 5.

CRIMINAL LAW—*Appeal—Sentence—Plea of Guilty—Sentence quashed—Sentence in Substitution—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 3.

Where a prisoner pleads guilty at his trial the Court of Criminal Appeal has power to quash the sentence passed upon him and to substitute such other sentence, warranted in law, as they think ought to have been inflicted.

Rex v. *Davidson*, [1909] W. N. 52, overruled on this point. THE KING *v.* ETTRIDGE **C. C. A. 24**

2. —— *Cruelty to Animals—Four Animals—Information charging One Offence—Four*

CRIMINAL LAW—*continued.*

Convictions—Validity—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

An information under s. 2 of the Cruelty to Animals Act, 1849, charged the defendant for that he did cruelly ill-treat four ponies between certain dates by neglecting to supply them with nourishing food. The defendant was convicted by a Court of summary jurisdiction and fined 5*l.* in respect of each pony. Four convictions were drawn up, each of which stated that the defendant had been convicted of ill-treating "a pony" in the manner alleged in the information. The defendant had no notice before conviction that he was being charged with a separate offence in respect of each pony :—

Held, that the information alleged only one offence, and that the defendant could not, without previous notice, be convicted on that information of four offences ; three of the convictions were bad and must be quashed. THE KING *v.* RAWSON - - - **Div. Ct. 748**

3. —— *Evidence—Admissibility of Dying Declaration.*

In order that a dying declaration as to the cause of death may be admissible in evidence at the trial of a prisoner for the murder of the declarant it must be shewn that at the time the statement was made the death of the declarant was imminent and that he had abandoned all hope of living, i.e., believed that death must follow. But it is not necessary to prove that the declarant believed that death would ensue immediately.

Ruling of Lush L.J. in *Reg.* v. *Osman*, (1881) 15 Cox, C. C. 1, not followed. THE KING *v.* PERRY - - - - - - **C. C. A. 697**

4. —— *Evidence — Cross-examination of Prisoner—Questions tending to shew Commission of another Offence—Admissibility—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1 (*f*) (i.).

On the trial of a prisoner charged with having had carnal knowledge of a girl aged fourteen, the prosecutrix stated in her examination in chief that on the day after the connection had taken place the prisoner told her that he had previously done the same thing to another girl, who was alleged by the prosecution to have been under sixteen at the time. The prisoner gave evidence, and he was asked in cross-examination. and the questions were allowed by the judge, whether he had made the statement attributed to him by the prosecutrix and whether it was true. The prisoner was convicted :—

Held, that under s. 1 (*f*) (i.) of the Criminal Evidence Act, 1898, the prisoner was bound to answer the questions, because, although they tended to shew that he had committed another offence or was of bad character, the questions were admissible to shew that he was guilty of the offence wherewith he was then charged. THE KING *v.* CHITSON - - **C. C. A. 945**

5. —— *Falsification of Accounts—Machine—Taximeter—Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24), *s.* 1.

By s. 1 of the Falsification of Accounts Act, 1875, it is enacted that if any servant shall

CRIMINAL LAW—*continued.*

wilfully and with intent to defraud falsify any account which belongs to his employer, or has been received by him on behalf of his employer, the person so offending shall be guilty of a misdemeanour :—

Held, that a servant may be convicted under the above enactment who wilfully and with intent to defraud tampers with a mechanical instrument used by his employer for registering figures from which an account is subsequently prepared as between the parties.

A company were the owners of certain motor cabs and had in their service a number of cab-drivers. Each cab was fitted with a taximeter, that is, a mechanical instrument which, when in action, registers upon a dial the amount earned by the driver from persons hiring the cab. The taximeter was put into and out of action by the driver depressing and raising a lever respectively. From the figures appearing on the dial at the end of the day an account was prepared stating the proportions due to the company and to the driver for the use of the cab.

For several successive days a driver in the company's service took certain passengers on a definite round, receiving from them on each day the same fare. While taking the passengers on this round, the driver wilfully and with intent to defraud drove the cab with the lever of the taximeter raised, so that the instrument was put out of action and registered nothing :—

Held, that the driver was properly convicted of falsifying an account within the meaning of the above enactment. THE KING *v.* SOLOMONS **C. C. A. 980**

6. —— *Insanity — Person totally Deaf — Incapacity to understand Proceedings—Detention during His Majesty's Pleasure—Criminal Lunatics Act*, 1800 (39 & 40 *Geo.* 3, *c.* 94), *s.* 2.

A prisoner who was totally deaf and could neither read nor write was arraigned for a felony. Upon being arraigned he stood mute, and a jury, duly impanelled and sworn for the purpose, found that he was mute by the visitation of God. The jury were sworn again to try whether he was capable of pleading to the indictment, and they found that he was incapable of pleading to and taking his trial upon the indictment and of understanding and following the proceedings by reason of his inability to communicate with and be communicated with by others. Upon this finding the judge, acting under s. 2 of the Criminal Lunatics Act, 1800, ordered him to be kept in custody until His Majesty's pleasure should be known :—

Held, that the finding amounted to a finding that the prisoner was insane within the meaning of the Act, and that the order was properly made. THE KING *v.* GOVERNOR OF HIS MAJESTY'S PRISON AT STAFFORD. *Ex parte* EMERY - - - - - **Div. Ct. 81**

7. —— *Penal Servitude—Remanet Sentence—Conviction on Indictment for New Offence—Order that Sentence for New Offence run concurrently with, or commence after expiration of, Remanet Sentence—Jurisdiction of Court—Penal Servitude Act*, 1864 (27 & 28 *Vict. c.* 47), *s.* 9—

CRIMINAL LAW—*continued.*

Penal Servitude Act, 1891 (54 & 55 *Vict. c.* 69), *s.* 3, *sub-s.* 3.

Where the holder of a licence to be at large during a remanet (i.e., an unexpired portion of a sentence of penal servitude) is subsequently convicted of an indictable offence, the Court before which the subsequent conviction takes place has no power to order that the sentence which it inflicts shall commence after or run concurrently with the remanet which, upon conviction for the new offence, the convict becomes liable to serve under s. 9 of the Penal Servitude Act, 1864, inasmuch as that section provides that a term equal to the remanet shall be served after the convict has undergone the punishment for the subsequent offence. Therefore, in passing sentence for the subsequent offence, the Court should make no reference to the remanet. THE KING *v.* SMITH. THE KING *v.* WILSON **C. C. A. 756**

8. —— *Practice—Abortive Trial—Rehearing—Evidence on former Hearing—Evidence on Rehearing.*

Several persons having been charged with conspiracy to defraud, a summons was issued, and the hearing commenced before a magistrate. When the inquiry had lasted a considerable time and the evidence of a large number of witnesses had been taken, the magistrate fell ill and was unable to continue the hearing, which had to be recommenced before another magistrate. At the commencement of the rehearing counsel for the prosecution proposed to take the following course:—To recall some of the witnesses called at the first hearing; to reswear them; to read to them their depositions taken at that hearing, directing them to correct the evidence if and where it was inaccurate; to ask them any additional questions that might be thought advisable; then to tender these witnesses for cross-examination, with liberty for the prosecution to re-examine where necessary; and then to proceed with the oral examination of those witnesses whom the prosecution intended to call but had not called on the first hearing:—

Held, that there was nothing illegal in the course proposed, and that to accede to the proposal if he thought it expedient in the interests of justice so to do was within the discretion of the magistrate, with which the Court would not interfere. *Ex parte* BOTTOMLEY - **Div. Ct. 14**

CROSS-EXAMINATION — Evidence — Cross-examination of prisoner — Questions tending to shew commission of another offence - - - - - - **945**
See CRIMINAL LAW. 4.

CROWN—*Privilege of—Action between Subjects involving Rights of the Crown—Foreshore—Right of Crown to transfer Action to Revenue Side.*

A statement of claim alleged that the plaintiff was in possession of an oyster fishery and oyster beds in the estuary of a river and was the owner of large quantities of oysters that he had placed there, and that the defendants, being the harbour commissioners of the said estuary, wrongfully caused certain vessels to anchor upon the oyster beds, whereby the oysters were damaged. The Attorney-General claimed to have the action removed to the Revenue side of the King's Bench Division upon the suggestion that the rights of the Crown as the owner of the foreshore might be thereby affected:—

Held that, although the plaintiff did not claim to be in possession under any title, and the defendants did not justify their acts under the authority of the Crown, the Crown was entitled to have the action removed. ULMANN *v.* COWES HARBOUR COMMISSIONERS **Channell J. 1**

—— Dog licences—Duties in respect of dogs—Penalty for keeping dog without licence—Information dismissed—Order to pay costs—Costs paid to clerk to justices—Debt due to Crown - - - **7**
See REVENUE. 2.

CRUELTY TO ANIMALS — Four animals — Information charging one offence—Four convictions—Validity - - - **748**
See CRIMINAL LAW. 2.

CUSTOMS AND INLAND REVENUE.
See under REVENUE.

DAMAGE — Ship — Charterparty — Excepted perils—Deviation—Damage to cargo—Liability of shipowner - - **360**
See SHIPPING. 1.

DAMAGES—*Breach of Warranty, Action for—Sale of Food—Warranty of Article as fit for Human Consumption—Death of Plaintiff's Wife through eating Food sold to him—Loss of Wife's Services—Death no Part of Cause of Action.*

In an action for breach of a warranty that tinned salmon sold by the defendants to the plaintiff was fit for consumption as human food, the plaintiff claimed damages under the following head, among others, namely, on the ground that his wife having partaken of the salmon had in consequence died, and that, she having performed services for him in the care of his house and family until her death, he was under the necessity after her death of hiring some one else to perform such services. The jury found a verdict for the plaintiff and awarded 200*l.* in respect of the damages claimed as above mentioned:—

Held that, the death of the plaintiff's wife not forming an essential part of the cause of action sued upon, but only an element in ascertaining the damages arising therefrom, there was no rule of law which prevented such damages as aforesaid from being recoverable in the action.

Baker v. *Bolton*, (1808) 1 Camp. 493, considered and distinguished. JACKSON *v.* WATSON & SONS - - - - - - - **C. A. 193**

DEATH — Damages — Death of plaintiff's wife through eating food sold to him—Death no part of cause of action - - **193**
See DAMAGES.

DEBTS — Attachment of — Garnishee order — Retired pay of officer in Army—Pension due but not paid — Bank crediting amount to customer - - - **1029**
See ATTACHMENT.

—— Specialty debt—Bond—Lost acknowledgment—Parol evidence—Onus of proof
See LIMITATIONS. **724**

DEBTORS ACT—Costs in Divorce Court—Order to pay—Default—Judgment summons
See BANKRUPTCY. 2. **430**

—— Judgment summons by married woman—Judgment debtor a creditor—Costs in bankruptcy—Set-off - - - **622**
See BANKRUPTCY. 3.

DEFAMATION — *Libel — Absolute Privilege — Official Receiver in Companies' Liquidation—Observations published to Creditors and Contributories of Company in Liquidation—Inspector-General in Companies' Liquidation—General Annual Report of Board of Trade—Companies (Winding up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 8, 27, 29 ; *First Schedule*, *s.* 3.

An action for libel will not lie against an official receiver in respect of observations on the affairs of a company in liquidation published by him to the creditors and contributories of the company in the performance of his duty as prescribed by the Companies (Winding up) Act, 1890, First Schedule, s. 3, such observations being absolutely privileged.

Where an officer appointed by the Board of Trade under the Companies (Winding up) Act, 1890, s. 27, had, in the performance of his duty, prepared for and delivered to that Board a report on matters within s. 29, sub-s. 2, of the Act for the purpose of its being laid by them before Parliament as part of their general annual report as directed by that sub-section :—

Held, that an action for libel would not lie against him in respect of statements contained in that report. BURR *v.* SMITH - **C. A. 306**

2. —— *Libel in Newspaper—Publication—Intention to defame Plaintiff.*

The defendants, who were the proprietors and publishers of a newspaper, published in an article in their paper defamatory statements of a named person believed by the writer of the article and by the defendants to be a fictitious personage with an unusual name not likely to be that of an existing individual ; the name was in fact that of the plaintiff, who was unknown to the writer of the article and to the editor of the newspaper. During the trial of an action for libel it was admitted that neither the writer nor the defendants intended the defamatory statements to apply to the plaintiff, but evidence was given by friends of the plaintiff who had read the article that they thought the article referred to him. On appeal by the defendants from a verdict and judgment in favour of the plaintiff :—

Held by Lord Alverstone C.J. and Farwell L.J. (Fletcher L.J. dissenting), that the plaintiff was entitled to succeed.

Per Lord Alverstone C.J. : Where an untrue and defamatory statement in writing is published

DEFAMATION —*continued.*

without lawful excuse, which in the opinion of the jury upon the evidence refers to the plaintiff, the cause of action is made out, the question not being whether the defendant intended the defamatory language to refer to the plaintiff, but whether it was understood by reasonable people who knew the plaintiff to refer to him.

Per Fletcher Moulton L.J. : In order to prove the allegation in an action of libel that the defamatory words were written and published "of and concerning the plaintiff" it must be shewn affirmatively that the defendant intended them to refer to the plaintiff.

Per Farwell L.J. : It is not enough for a plaintiff in libel to shew that the defendant has made a libellous statement, and that the plaintiff's friends and acquaintances believe it to be written of him : he must also prove that the defendant printed and published it of him. This can be done not only by shewing that such was the defendant's actual intention, but also by shewing that the statement is made recklessly, careless whether it fits the plaintiff or not. The question is not what the defendant really intended in his heart, but what his words taken with the relevant surrounding circumstances and fairly construed mean. The fact that the plaintiff was unknown to the defendant is not of itself a conclusive defence. JONES *v.* E. HULTON & Co. **C. A. 444**

3. —— *Libel—Parliamentary Paper—Printing Extract from—Privilege—Communication by Public Servant—Matter of Public Interest — Duty to communicate—Communication published in Newspaper — Fair Comment — Comment on Allegation contained in privileged Document—Evidence in Mitigation of Damages—Rules of Supreme Court*, 1883, *Order* XXXVI., *r.* 37 — *Parliamentary Papers Act*, 1840 (3 & 4 *Vict. c.* 9), *s.* 3.

A person who bona fide and without malice prints and publishes an extract from or an abstract of a parliamentary paper, though in doing so he does not act by or under the authority of either House of Parliament, is protected by s. 3 of the Parliamentary Papers Act, 1840, in an action for libel in respect of such publication.

Mangena v. *Edward Lloyd, Ld.*, (1908) 98 L. T. 640, followed.

Where an allegation is made against a person in a privileged document, as, for instance, in a parliamentary paper, a comment upon that allegation by a person who is not the person making the allegation may be fair comment, even though the allegation be untrue.

A communication by a public servant of a matter within his own province concerning the conduct of a person who is for the time taking a public part, the matter being one of public interest as to which the public are entitled to information, may be a privileged communication on the part of that public servant, and, if sent by him to a newspaper and published therein, it may also be the subject of privilege in the proprietor of the newspaper, as that is the ordinary channel by means of which the communication can be made public.

Order XXXVI., r. 37, of the Rules of the

DEFAMATION—*continued.*
Supreme Court, 1883, has not altered the common law as laid down in *Scott* v. *Sampson*, (1882) 8 Q. B. D. 491, with reference to the admissibility of evidence of the plaintiff's bad character in mitigation of damages in an action of libel. MANGENA *v.* WRIGHT - - **Phillimore J. 958**

DEMURRAGE — Ship — Charterparty— Lien — Demurrage payable day by day — "Charges" - - - - - - **998**
See SHIPPING. 2.

DEPENDANT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

DEVIATION — Ship — Charterparty— Excepted perils—Damage to cargo—Liability of shipowner - - - - - - **360**
See SHIPPING. 1.

DIRECTORS — Cheque drawn by directors on behalf of company — Forgery —Negligence - - - - - - - **1010**
See BANKER.

DISCOVERY—Workmen's compensation—Interrogatories—Jurisdiction of county court judge - - - - - - - **791**
See EMPLOYER AND WORKMAN. 14.

DISEASE—Workmen's compensation **529, 533, 798**
See EMPLOYER AND WORKMAN. 2, 12, 18.

DISTRESS—Fixtures—Advertisement hoardings —Right to distrain - - - **344**
See LANDLORD AND TENANT. 1.

—— Rent, Distress for—Rent due on Sunday—Legality of distress levied on following Monday - - - - - - **753**
See LANDLORD AND TENANT. 2.

DIVORCE—Costs in Divorce Court—Order to pay—Default—Judgment summons
See BANKRUPTCY. 2. **430**

DOGS—Dog licence—Exemption—Dogs for tending sheep and cattle—Consent of petty sessional court - - - - **497**
See REVENUE. 1.

—— Duties in respect of dogs—Penalty for keeping dog without licence—Information dismissed—Costs—Debt due to Crown
See REVENUE. 2. **7**

DRAINS.
See under SEWERS.

DROWNING — Workmen's compensation—Seaman — Unexplained drowning — Evidence—Presumption - - - **46**
See EMPLOYER AND WORKMAN. 19.

DYING DECLARATION — Admissibility of — Evidence - - - - - - **697**
See CRIMINAL LAW. 3.

EDUCATION — *Public Elementary School — Teachers—Salaries—Provided and Non-provided Schools—Local Education Authority—Right to discriminate — Failure to maintain and keep efficient—Board of Education—Decision—Want of Jurisdiction — Certiorari — Mandamus — Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

On the coming into force of the Education Act, 1902, the local education authority of Swansea continued to pay salaries to the teachers in the schools in the district at the rates previously in existence, the salaries paid to teachers in provided schools being at a higher rate than those paid to teachers of similar qualifications in non-provided schools. Subsequently an increase was made in the salaries paid to teachers in the provided schools only, and the managers of a non-provided school in the district complained to the Board of Education that the local education authority, by refusing to pay salaries in the non-provided school at the same rate as in the provided schools, had failed to maintain and keep efficient the non-provided school, as provided by s. 7 of the Education Act, 1902. The Board appointed a barrister to hold an inquiry, who, after hearing evidence on behalf of the managers, reported that the school had regularly earned the grant, but only through the deficiency in salaries having been made good by the managers, and that the local education authority had failed to maintain and keep efficient the school. The Board of Education decided that there had been no such failure by the local education authority, on the grounds that there was no statutory right on the part of the managers of any particular school to receive any particular scale of salaries, and that it had not been shewn that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question:—

Held, that the local education authority had no power under the Education Act, 1902, to discriminate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries to be paid in provided schools and those to be paid in non-provided schools.

Held, also, that the decision of the Board of Education was bad and must be quashed, and that a mandamus should issue to the Board of Education directing them to determine the question according to law, on the grounds (1.) that the decision of the Board was based on a disregard of the duties imposed on the local education authority by the Act of 1902, and was therefore made without jurisdiction; and (2) that the Board, in deciding that it had not been shewn that teachers could not be obtained at the lower scale of salary, had not decided the real question submitted by the managers to the Board for their decision. THE KING *v.* BOARD OF EDUCATION - - - **Div. Ct. 1045**

—— Schools. *See* under SCHOOLS.

EGGS—Game—Seizure and detention by police officer of partridges' eggs — Poaching prevention - - - - - **415**
See GAME.

ELECTION—Lease—Forfeiture — Relief — Writ claiming possession—Election to determine tenancy—Underlease - - **894**
See LANDLORD AND TENANT. 3.

ELEMENTARY EDUCATION.
See under SCHOOLS.

EMPLOYER AND WORKMAN — *Compensation — Abroad, Accident happening — Claim by Dependant—Jurisdiction—Scope of Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58).

The Workmen's Compensation Act, 1906, has no application outside the territorial limits of the United Kingdom, except in the case of seamen and apprentices as provided by s. 7.

Where an English workman in the employment of English contractors was sent out by them to Malta to work for them there, and met with a fatal accident :—

Held, that his widow was not entitled to compensation under the Workmen's Compensation Act, 1906. TOMALIN *v.* S. PEARSON & SON, LIMITED - - - - - - **C. A. 61**

2. —— *Compensation—"Accident"—Disease — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman in the employment of a firm of shipbuilders, while engaged in tightening a nut with a spanner and pressing down the spanner, suddenly fell down dead. The post mortem examination shewed that the man was suffering from a very large aneurism of the aorta, that he died from rupture of the aorta, and that the rupture might have been brought about by very slight exertion.

The county court judge found that death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal :—

Held, that this was an "accident" within the meaning of the Workmen's Compensation Act, 1906. HUGHES *v.* CLOVER, CLAYTON & CO. - - - - - - **C. A. 798**

3. —— *Compensation—Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A lady's maid in the course of her employment was sewing in her employer's nursery, which was lighted by electric light. A cockchafer flew into the room by an open window and so alarmed her that she involuntarily hit her eye with her hand and permanently injured her eyesight. Upon an application for compensation under the Workmen's Compensation Act, 1906 :—

Held, that the injury was not caused by an accident arising out of the employment within the meaning of the Act and that the application failed. CRASKE *v.* WIGAN - - **C. A. 635**

4. —— *Compensation—Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman employed at certain works

EMPLOYER AND WORKMAN—*continued.*

climbed on to a hot water tank in the building to eat his supper. The tank was only partially covered in. On returning to his work the man fell into the tank and was scalded to death. The workmen were not allowed on the tank :—

Held, that the accident did not arise "out of the employment" within the meaning of the Workmen's Compensation Act, 1906, and that compensation was not recoverable under that Act. BRICE *v.* EDWARD LLOYD, LIMITED **C. A. 804**

5. —— *Compensation—Accident arising out of and in the Course of Employment—Duration of Employment—Accident on Employers' Premises while Workman is leaving by usual and permitted Route — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A collier left his work, after coming up from the pit, by a route which crossed on the level some lines of rail belonging to and under the control of his employers. At the time the workman tried to cross there were some trucks standing on the line, and he tried to get under them ; as he was doing so the trucks moved, and he was seriously injured. The county court judge found on the facts that there were three ways by which the workman might have gone home, but the way he went by was the shortest, was always used by all the workmen who lived in the same direction as the applicant, and was so used with the knowledge and consent of the employers :—

Held, that the accident arose out of and in the course of the applicant's employment within the meaning of the Workmen's Compensation Act, 1906, s. 1. GANE *v.* NORTON HILL COLLIERY COMPANY - - - **C. A. 539**

6. —— *Compensation—Agreement—Registration — Review of Weekly Payment — Form of Application to Review—Date from which Review may be ordered—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 16 ; *Sched. II., par.* 9.

Upon an application under the Workmen's Compensation Act, 1906, for a review and termination of a weekly payment payable by way of compensation to a workman who has been injured by an accident arising out of and in the course of his employment, under an agreement between the employer and the workman, where the ground on which termination is claimed is stated in the particulars to be that the incapacity resulting from the injury has ceased, without specifying any date, it is not competent to the arbitrator to award that the payment shall terminate from a date antecedent to the application to review.

So *held* by the Court of Appeal (Buckley L.J. dissenting) on the authority of *Upper Forest and Western Steel and Tin Plate Co.* v. *Thomas*, [1909] 2 K. B. 631.

But *semble* where the application to review asks in express terms for termination from a definite antecedent date it is competent to the arbitrator to order termination from that date. CHARING CROSS, EUSTON, AND HAMPSTEAD RAILWAY COMPANY *v.* BOOTS - - **C. A. 640**

EMPLOYER AND WORKMAN—*continued.*

7. —— *Compensation—Agreement—Registration—Review of Weekly Payment—Form of Application to Review—Date from which Review may be ordered—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., par.* 12; *Sched. II., par.* 8.

An application under the Workmen's Compensation Act, 1897, to record an agreement between a workman who had been injured by an accident arising out of and in the course of his employment and his employer for payment of a weekly sum to the workman during incapacity was opposed by the employer on the ground that the man had recovered. The county court judge, however, ordered the agreement to be recorded, but granted a stay to enable the employer to apply for a review. The employer by his application to review asked for termination of the weekly payment, the ground alleged in the particulars being that "the respondent has completely recovered" from the accident, without specifying any date. The county court judge found that the incapacity of the workman had ceased at an antecedent date and ordered that the payment should terminate from that date:—

Held, that upon an application to review in this form the judge had no jurisdiction to order a review from a date antecedent to the application, and that the award ought to be set aside. UPPER FOREST AND WESTERN STEEL AND TINPLATE COMPANY *v.* THOMAS **C. A. 631**

8. —— *Compensation* — "*Dependant*" — "*Member of a Family*"—*Stepfather—Illegitimate Child—Maintenance of Family by Workman — Workman's Earnings supplemented by Illegitimate Child's Wages—Claim of Mother—Partial Dependency—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13; *Sched. I.* (1.) (*a*) (ii.).

M. had married a woman with an illegitimate son of whom he was not the putative father: the three lived together, the son paying his wages to his mother, who put them into the common fund out of which the whole family was maintained. The son having met with a fatal accident, M. and his wife claimed compensation as "dependants":—

Held, that M. was not the "stepfather" of the deceased and therefore not within the class of dependants mentioned in s. 13.

Held, also, by Cozens-Hardy M.R. and Kennedy L.J. (Buckley L.J. dissenting), applying *Senior* v. *Fountains & Burnley, Ld.*, [1907] 2 K. B. 563, that, in the ordinary case of a husband and wife living together with other members of the family, the wife cannot claim as distinct from the husband to be dependent upon the earnings of a member of the family whose wages have gone to increase the common fund and have not been in any way appropriated to the benefit of the mother as distinct from her husband, and consequently that the mother also was not a dependant.

Held by Buckley L.J., that dependency was a question of fact in each case, and that on the facts of this case the mother was dependent on her son's earnings and entitled to compensation. MCLEAN *v.* MOSS BAY IRON AND STEEL COMPANY - - - - - - - **C. A. 521**

9. —— *Compensation — Decision of County Court Judge on Preliminary Question—Appeal to Court of Appeal — Jurisdiction — Certified Scheme — Rules of Management — Rules not certified—Scheme under Act of* 1897—*Commencement of Act of* 1906—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 15; *Sched. II.* (4.) —*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 3.

Under clause 4 of Sched. II. to the Workmen's Compensation Act, 1906, an appeal now lies to the Court of Appeal from a decision by a county court judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, and not, as formerly, only after an award has been made.

A scheme of compensation certified by the Registrar of Friendly Societies under s. 3 of the Workmen's Compensation Act, 1897, cannot, unless recertified under the Act of 1906, apply to an accident happening after the commencement of the Act of 1906, though within the six months at the end of which the scheme is declared to be revoked by s. 15.

A scheme providing a fund for the compensation of the servants of a railway company provided that the fund should be managed by a committee thereby constituted according to rules (not inconsistent with the terms of this scheme) to be framed from time to time by the committee. Rules had been framed containing a contract by the workmen that the Act should not apply, and other provisions held by the Court not to be in accordance with the scheme. The scheme was certified, but the rules were not:—

Held, that there was no properly certified scheme excluding the Act. MOSS *v.* GREAT EASTERN RAILWAY COMPANY - - **C. A. 274**

10. —— *Compensation—Evidence—Inference —Onus of Proof—Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

It is competent for the Court to draw an inference from the facts proved that the accident causing injury or death did happen "in the course of" and arose "out of" the employment, although no person was present who could give direct evidence how and when the accident happened, but the onus of proof is on the applicant in every case, and none the less so because by the death of the workman a greater burden is placed on the dependants of the deceased.

While a steamship was on the high seas, the chief cook and baker was lost overboard; the weather was fine at the time, the ship was steady, and there was a four-foot rail and bulwark all round. The deceased was last seen at 5.35 A.M. going aft. His widow applied for compensation under the Workmen's Compensation Act, 1906:—

Held, that there was no evidence which would enable the Court to draw the necessary inference that the accident causing death arose "out of"

EMPLOYER AND WORKMAN—*continued.*

as well as "in the course of" the employment. BENDER *v.* OWNERS OF STEAMSHIP ZENT **C. A. 41**

11. —— *Compensation — Examination of Workman by Medical Practitioner—Employer's Right—Condition—Workman requiring Presence of his own Medical Man—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., clause* 14.

A medical man, instructed by the employers, asked a workman in receipt of weekly payments under the Workmen's Compensation Act to submit himself to examination. The man answered that he had no objection provided his own medical man was present:—

Held, that he had not refused to submit himself to examination within the meaning of the Act. DEVITT *v.* OWNERS OF STEAMSHIP BAINBRIDGE - - - - - **C. A. 802**

12. —— *Compensation—Incapacity resulting from Injury—Disease—Natural Result—Injury by Accident—Workmen's Compensation Act*, 1906, (6 *Edw.* 7, *c.* 58), *s.* 1 ; *Sched. I., par.* 1 (*b*).

Where a workman receives personal injury from an accident arising out of and in the course of his employment and disease ensues which incapacitates him for work, the incapacity may be the result of the injury within the meaning of Sched. I., par. 1 (*b*), of the Workmen's Compensation Act, 1906, even though it is not the natural result of the injury. The question to be determined on a claim for compensation is whether the incapacity is in fact the result of the injury. YSTRADOWEN COLLIERY COMPANY, LIMITED *v.* GRIFFITHS - - **C. A. 533**

13. —— *Compensation—Mode of Assessment —Seaman—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 7, *sub-s.* 1 (*e*); *Sched. I., par.* 3.

By s. 7, sub-s. 1, of the Workmen's Compensation Act, 1906, the Act is applied to seamen, subject to certain modifications, including (*e*), which provides that the weekly payment shall not be payable in respect of the period during which the shipowner is liable under the Merchant Shipping Acts to defray the expenses of maintenance of the injured seaman.

By par. 3 of the First Schedule, in fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity:—

Held (Kennedy L.J. dissenting) that, in the case of a seaman, as in the case of any other workman, (1.) the "period of incapacity" dates from the accident and means the period during which the man is disabled from earning his full wages at his work, and is not limited to the period during which the employer is liable to pay compensation ; (2.) the payments to which regard is to be had are not restricted to voluntary payments, but include payments under a contract whether for wages or otherwise ; consequently, that in assessing the compensation payable under the Act to an injured seaman the arbitrator is bound to have regard to wages paid to the man in accordance with s. 158 of the Merchant Shipping Act, 1894, between the date of the accident and the date of his discharge; but that "regard" is not equivalent to deduction, and that the mode and extent of the regard are left to the discretion of the arbitrator.

Per Farwell L.J. : Upon the true construction of s. 7, sub-s. 1 (*e*), and par. 3 of the First Schedule the arbitrator, in fixing the amount of compensation in the case of a seaman, ought not to have regard to the expenses of maintenance and medical attendance payable by the shipowner under the Merchant Shipping Acts. MCDERMOTT *v.* OWNERS OF STEAMSHIP TINTORETTO - - - - - **C. A. 704**

14. —— *Compensation — Practice — Interrogatories — Discovery — Jurisdiction of County Court Judge—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II.* (4.)—*Workmen's Compensation Rules*, 1907, *r.* 27.

A county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1906, is acting as an arbitrator only, and has no jurisdiction to make an order for discovery before hearing either by affidavit of documents or by interrogatories.

Mountain v. *Parr*, [1899] 1 Q. B. 805, applied. SUTTON *v.* GREAT NORTHERN RAILWAY COMPANY - - - - - - **C. A. 791**

15. —— *Compensation—Principal, Liability of — "The Contractor" — Sub-contracting — "Workman"—Member of Employer's Family—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1, 2, 3 ; *s.* 13.

The respondent employed a contractor to execute certain work for him ; the contractor employed his son, who was dwelling in the same house with him, to help in the work ; the son met with an accident arising out of and in the course of his employment, for which he claimed compensation under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, from the respondent. It was admitted that, having regard to the definition of workman in s. 13, the son could not claim against the contractor:—

Held, that the respondent, "the principal," was not liable to pay compensation to a man who had no claim against the contractor, his true employer.

Construction of s. 4, sub-ss. 1, 2, and 3, considered. MARKS *v.* CARNE - - **C. A. 516**

16. —— *Compensation—Review of Weekly Payments — Nominal Award — Jurisdiction—Suspensory Order—Practice—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application by an employer under the Workmen's Compensation Act, 1906, Sched. I. (16.), to have the weekly payments reviewed on the ground that the incapacity no longer existed, there is jurisdiction, in a case where the incapacity, owing to the effects of the original accident, may recur, to suspend instead of ending the compensation by awarding a nominal sum or by making a declaration of continuing liability,

EMPLOYER AND WORKMAN—*continued.*

and this is the proper course to be adopted in these cases.

Singer Manufacturing Co. v. *Clelland*, (1905) 42 Sc. L. R. 757, questioned on this point. OWNERS OF THE VESSEL TYNRON *v.* MORGAN **C. A. 66**

17. —— *Compensation—Review of Weekly Payments—Earning Capacity of Workman—Nervous Prostration—Loss of Will Power—Physical and Muscular Recovery—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

On an application by an employer under the Workmen's Compensation Act, 1906, Sched. I. (16.), to have the weekly payments reviewed, the nervous and mental as well as the physical condition of the injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity. It is not sufficient for the employer to shew that the muscular and physical mischief caused by the accident has come to an end. EAVES *v.* BLAENCLYDACH COLLIERY COMPANY **C. A. 73**

18. —— *Compensation—Seamen—Industrial Diseases—Certifying Surgeon—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 7, 8; *Sched. III.*

The applicant, whose home was at Liverpool, was employed by the respondents as a boatswain, and whilst painting the ship's hold at sea contracted lead poisoning. He was discharged in New York in April, 1908, subsequently returned to Liverpool, and in January, 1909, obtained a certificate from the certifying surgeon for the Liverpool district under the Factory and Workshop Act, 1901, that he was disabled by lead poisoning from following his usual employment:—

Held, that under s. 8, sub-s. 1, par. 1, of the Workmen's Compensation Act, 1906, before the applicant could make any claim for compensation in respect of an industrial disease he must get a certificate from the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which he was employed; and that, inasmuch as there was no district in which he was employed at the time when he contracted the disease, he could not successfully make a claim. CURTIS *v.* BLACK & CO. **C. A. 529**

19. —— *Compensation — Seaman - Unexplained Drowning—Evidence—Presumption—Accident arising out of and in the Course of Employment — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The unexplained drowning of a seaman engaged on board ship does not of itself raise any presumption that his death was the result of an accident arising out of as well as in the course of his employment so as to entitle his dependants to compensation under the Workmen's Compensation Act, 1906. MARSHALL *v.* OWNERS OF STEAMSHIP WILD ROSE - - - **C. A. 46**

20. —— "*Seaman*" — *Workman — Hand assisting to move Ship from one Part of Dock to another—Negligence—Master and Servant—Ship—Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 2—*Employers and Workmen Act*, 1875 (38 *&* 39 *Vict. c.* 90), *s.* 13—*Employers' Liability Act*, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 8—*Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 742.

The plaintiff was engaged with other men in warping a vessel owned by the defendants, by whom he was employed, from one berth to another across a large dock connected with a tidal river. He was not a member of the crew of the vessel. During the operation he sustained personal injuries, the duty in which he was engaged at the time he was injured consisting of unmooring the vessel from the side of the dock where she was then lying and passing ropes to a tug and to the quay alongside which she was to be moored. The vessel was taken across by means of the tug and a rope, and was during this operation at no moment entirely free from a quay. She was not using her own steam nor any motive power of her own.

In an action brought by the plaintiff under the Employers' Liability Act, 1880, against the defendants, his employers, for damages for the personal injuries sustained by him whilst in their employment:—

Held, that he was a "seaman" and was consequently excluded from the operation of the Employers' Liability Act, 1880.

Corbett v. *Pearce*, [1904] 2 K. B. 422, followed. CHISLETT *v.* MACBETH & CO. **Div. Ct. 36**

21. —— *Compensation—Surgical Operation — Cause of Death — Remoteness — Accident — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Where a workman is injured by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906, and death ensues from an operation consequent thereon, the test of the question whether death was caused by the accident so as to entitle his dependants to compensation is whether in the circumstances the operation was a reasonable step to be taken to obviate the consequences of the accident.

A workman met with an accident arising out of and in the course of his employment whereby his hand was badly lacerated. A competent surgeon proposed, instead of amputating the hand, by means of a double operation, to graft skin on it which would completely preserve the hand. An anæsthetic was properly administered at each stage of the operation, but on the second occasion death unexpectedly ensued.

Upon an application by the widow under the Workmen's Compensation Act, 1906, the county court judge found that death was caused not by the accident, but by the administration of the anæsthetic, and held that the employers were not liable:—

Held, that the county court judge had misdirected himself in not applying his mind to the question whether the deceased had acted reasonably, and that the widow was entitled to compensation. SHIRT *v.* CALICO PRINTERS' ASSOCIATION, LIMITED - - - **C. A. 51**

EMPLOYER AND WORKMAN—*continued.*

22. —— *Compensation—Surgical Operation, Refusal to undergo—Period of Compensation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The question whether a workman who has met with an accident and refuses to submit to a surgical operation is entitled to compensation under the Workmen's Compensation Act, 1906, beyond the period when he might have been expected to recover from the effects of the accident if he had submitted to the operation depends on the question whether his refusal is in the circumstances reasonable; and where the operation is of a serious character, and the workman, in good faith, follows the advice of his own doctor, whose honesty and competency are not impeached, he cannot be said to be acting unreasonably, although on the balance of the medical testimony given at the hearing the county court judge may find that the operation was one which might reasonably and properly have been performed.

Warncken v. *R. Moreland & Son, Ld.*, [1909] 1 K. B. 184, distinguished. TUTTON *v.* OWNERS OF STEAMSHIP MAJESTIC - - **C. A. 54**

23. —— *Compensation—Weekly Payments—Redemption — Agreement for Lump Sum — Memorandum — Registration — County Court Judge—Jurisdiction—Power to assess Amount—"Such order as under the circumstances he may think just"—Injury to Workman—Permanent Incapacity—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., clause* 9 (*d*).

Where the registrar of a county court has refused to register an agreement between an employer and a workman, who has been injured in his service, for the redemption of a weekly payment by a lump sum, on the ground of the inadequacy of the sum agreed upon, and has referred the matter to the judge under Sched. II., clause 9 (*d*), of the Workmen's Compensation Act, 1906, the sole question for the judge is whether the agreement is one which ought or ought not to be recorded. He is not entitled to treat the agreement as a submission by the employer to pay any sum which the judge may, under the circumstances, think reasonable. MORTIMER *v.* SECRETAN - - - - - - **C. A. 77**

—— Coal mine — Negligence — Statutory duty —Common employment - - **146**
See MINES.

—— Compensation—"Seaman" - - **811**
See MASTER AND SERVANT. 1.

—— Master and servant.
See under MASTER AND SERVANT.

EMPLOYERS' LIABILITY.
See under EMPLOYER AND WORKMAN.

ENFRANCHISEMENT—Delay in—Copyholds—Compensation—Interest—Quittances
See LANDS CLAUSES ACTS. **374**

EQUITABLE EXECUTION.
See under EXECUTION.

ESTOPPEL — Arbitrator — Qualification — Arbitrator to be member of trade association —Arbitrator not member of association
See ARBITRATION. **948**

—— Insurance (Life)—Policy—Proposal basis of contract—Effect of absence of signed proposal - - - - - - **288**
See INSURANCE (LIFE).

EVIDENCE—Abortive trial—Rehearing—Evidence on former hearing - - **14**
See CRIMINAL LAW. 8.

—— Cross-examination of prisoner—Questions tending to shew commission of another offence—Admissibility - - - **945**
See CRIMINAL LAW. 4.

—— Dying declaration, Admissibility of - **697**
See CRIMINAL LAW. 3.

—— Lost acknowledgment—Parol evidence—Onus of proof—Specialty debt—Bond
See LIMITATIONS. **724**

—— Workmen's compensation—Accident—Inference—Onus of proof - - **41**
See EMPLOYER AND WORKMAN. 10.

—— Workmen's compensation—Seaman—Unexplained drowning — Evidence — Presumption - - - - - - **46**
See EMPLOYER AND WORKMAN. 19.

EXECUTION — Deposit of value of goods — Bailiff remaining in possession—Right to possession fees - - - **384**
See COUNTY COURT. 2.

—— Receiver — Appointment—Patent — Equitable execution - - - - **903**
See RECEIVER.

—— Stay of execution—Company—Arrangement with creditors — Judgment — Staying proceedings - - - **368**
See COMPANY.

FALSE IMPRISONMENT—*Railway Company —Special Constable—Arrest on Suspicion of Felony—Liability of Company.*

A special constable of a railway company is the servant of the company, and if in the course of his employment he arrests a person on suspicion of felony without having any reasonable grounds for his suspicion, an action for false imprisonment will lie against the company. LAMBERT *v.* GREAT EASTERN RAILWAY COMPANY - - - - - - - **C. A. 776**

FALSIFICATION OF ACCOUNTS—Machine—Taximeter - - - - - - **980**
See CRIMINAL LAW. 5.

FELONY—Railway company—Special constable — Arrest on suspicion of felony — Liability of company - - - **776**
See FALSE IMPRISONMENT.

FIXTURES—Distress—Advertisement hoardings —Right to distrain - - - **344**
See LANDLORD AND TENANT. 1.

FOREIGN COUNTRY—Gaming in—Cause of action — Money lent for purpose of gaming - - - - - - **209**
See GAMING.

FORESHORE — Action between subjects involving rights of the Crown—Right of Crown to transfer action to Revenue side - - - - - - - - **1**
See CROWN.

—— Justices—Jurisdiction—Ouster—Bona fide claim of right—Removal of shingle—Owner - - - - - - - **564**
See JUSTICES. 1.

FORFEITURE—Lease—Relief — Writ claiming possession — Election to determine tenancy—Underlease - - - **894**
See LANDLORD AND TENANT. 3.

FORGERY — Cheque drawn by directors on behalf of company — Negligence — Return of pass-book without objection —Settled account - - - **1010**
See BANKER.

FRANCHISE—Parliament.
See under PARLIAMENT.

GAME—*Seizure and Detention by Police Officer of Partridges' Eggs—Justification under Statute —Subsequent Proceedings under different Statute not giving Power to seize Eggs—Conviction of Person from whom Eggs seized quashed—Liability of Police Officer in Trover—Restoration of Game or "value thereof"—Game Act*, 1831 (1 & 2 *Will.* 4, *c.* 32), *s.* 24—*Poaching Prevention Act*, 1862 (25 & 26 *Vict. c.* 114), *ss.* 1, 2.

In s. 2 of the Poaching Prevention Act, 1862, "the value" of the game which is to be restored to an innocent person from whom it has been taken by a police officer, in pursuance of the power of seizure given by the section, means the value of the game at the time of the termination in favour of the innocent person of proceedings subsequently taken against him by the police officer under the provisions of the section, and not the value of the game at the time it was seized.

A police officer seized certain partridges' eggs in accordance with the provisions of s. 2 of the Act of 1862 (under which partridges' eggs are "game"), but subsequently took out a summons against the person from whom he seized them charging him before justices with an offence against s. 24 of the Game Act, 1831, which contains no power of seizure. A conviction under the summons was, on a case stated by the justices, quashed. By order of the justices the eggs were destroyed :—

Held, that the police officer was liable for the value of the eggs at the time they were seized in an action founded on trover, inasmuch as it is a condition subsequent to any steps that a police officer takes under s. 2 of the Poaching Prevention Act, 1862, that he should continue to proceed under that section in order to be entitled to its protection. If he seizes game with a bona fide intention of acting under s. 2 of the Act of 1862, but subsequently proceeds under a different statute, his act of seizure is thereby rendered unlawful and he becomes in law a trespasser. STOWE *v.* BENSTEAD - - - **Div. Ct. 415**

GAMING—*Cause of Action—Gaming in Foreign Country—Money lent for Purpose of Gaming.*

Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English Courts.

Quarrier v. *Colston*, (1842) 1 Ph. 147, followed.

Moulis v. *Owen*, [1907] 1 K. B. 746, discussed. SAXBY *v.* FULTON - - **C. A. 208**

GARNISHEE ORDER—Attachment of debts—Retired pay of officer in Army - **1029**
See ATTACHMENT.

GAS—Tramway company, Liability of—Additional expense imposed on gas company by reason of existence of tramway **297**
See TRAMWAY.

HARBOUR — Justices — Jurisdiction—Ouster—Bona fide claim of right—Foreshore—Removal of shingle—Owner - - **564**
See JUSTICES. 1.

HIGHWAY — *Repair — Expenses — Extraordinary Traffic — Excessive Weight — Timber Haulage—Staple Trade of District—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12.

The question whether traffic on any particular road is or is not extraordinary within the meaning of the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, is a question of fact; accordingly if, in an action by a highway authority to recover expenses of extraordinary traffic, it is proved that the traffic complained of was a recognized industry in the district and was carried on in the manner usual in the trade in that district, it is still open to the Court to find that the traffic in question is extraordinary as regards any particular road in the district. GEIRIONYDD RURAL DISTRICT COUNCIL *v.* GREEN **C. A. 845**

—— Locomotives on highways—Motor car.
See under MOTOR CAR.

—— Railway, Road raised to level of — Approaches to crossing — Repair of roadway of approaches - - **403**
See RAILWAY. 2.

HOARDINGS—Advertisement hoardings—Right to distrain—Fixtures - - - **344**
See LANDLORD AND TENANT. 1.

HOSPITAL — *Negligence — Public Hospital — Liability of Governors—Operation—Injury to Patient—Hospital Staff—Relation of Hospital to Patients.*

The only duty undertaken by the governors of a public hospital towards a patient who is treated in the hospital is to use due care and skill in selecting their medical staff. The

HOSPITAL—*continued.*
relationship of master and servant does not exist between the governors and the physicians and surgeons who give their services at the hospital, and the nurses and other attendants assisting at an operation cease for the time being to be the servants of the governors, inasmuch as they take their orders during that period from the operating surgeon alone and not from the hospital authorities.

The plaintiff brought an action against the governors of a hospital for damages for injuries alleged to have been caused to him during an operation by the negligence of some member of the hospital staff:—

Held, that the action was not maintainable. HILLYER *v.* GOVERNORS OF ST. BARTHOLOMEW'S HOSPITAL - - - - - **C. A. 820**

HOUSE REFUSE — Removal of refuse — Restaurant—House or trade refuse **588**
See LONDON. 5.

HUSBAND AND WIFE—*Joint and Several Promissory Note signed by Husband and Wife for Debt of Third Party—Influence of Husband—Absence of Independent Advice—Liability of Wife.*

The plaintiff having obtained judgment against a debtor, it was agreed that the judgment debtor and the two defendants in the present action, who were husband and wife, should give the plaintiff a joint and several promissory note, payable by instalments, for the amount of the judgment. The husband, who had business relations with the judgment debtor, procured his wife's signature to the promissory note, the jury finding that the transaction was sufficiently explained to her and that she knew that the document she was signing was a promissory note, and that she also knew she was incurring a possible liability for the benefit of the judgment debtor in so signing; they also found that her signature was procured by the influence of her husband, but could not agree as to whether it was procured by his undue influence. Default having been made by the judgment debtor in payment of the instalments of the promissory note, the present action was brought against the husband and wife to recover the balance of the instalments of the promissory note. The husband allowed judgment to go by default:—

Held that, notwithstanding the absence of independent advice, the wife was liable upon the promissory note.

Per Lord Alverstone C.J. and Fletcher Moulton L.J.: There is no general rule of universal application that the rule of equity as to confidential relationships necessarily applies to the relation of husband and wife, so as to throw on the husband, or on the person who is suing the wife, the onus of disproving an allegation of undue influence.

Per Farwell L.J.: The relation of husband and wife does not come within the equity laid down in *Huguenin* v. *Baseley*, (1807) 14 Ves. 273.

Barron v. *Willis*, [1899] 2 Ch. 578, approved. HOWES *v.* BISHOP - - - - **C. A. 390**

HUSBAND AND WIFE—*continued.*

2. —— *Married Woman—Judgment Debt—Wearing Apparel—Dresses purchased by Wife—Money supplied by Husband—Wife's separate Estate — Paraphernalia — Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75).

Wearing apparel purchased by a married woman for her personal use with money supplied for the purpose by her husband is prima facie her separate property, and, in the absence of evidence to rebut this presumption or to limit or qualify her possessory title, cannot be claimed by the husband as against an execution creditor of the wife.

Observations of Sir F. Jeune P. in *Tasker* v. *Tasker*, [1895] P. 1, on paraphernalia disapproved.

Per Farwell L.J.: Since the Married Women's Property Act, 1882, the old common law exception of paraphernalia from the husband's right to his wife's chattels personal has ceased to exist. MASSON, TEMPLIER & CO. *v.* DE FRIES - - - - - - **C. A. 831**

—— Separation order—Order for maintenance of wife—Non-payment by husband—Absence of evidence of means—Committal to prison - - - - **851**
See SUMMARY JURISDICTION.

ILLEGITIMATE CHILD—Workmen's compensation — "Dependant" — Workman's earnings supplemented by illegitimate child's wages - - - - **521**
See EMPLOYER AND WORKMAN. 8.

IMPRISONMENT—False imprisonment.
See under FALSE IMPRISONMENT.

INCOME TAX.
See under REVENUE.

INDUSTRIAL DISEASES—Workmen's compensation—Seaman—Certifying surgeon **529**
See EMPLOYER AND WORKMAN. 18.

INFANT—Restraint of trade—Severable stipulations—Contract for benefit of infant—Injunction - - - - **235**
See MASTER AND SERVANT. 2.

INJUNCTION—Contract for benefit of infant—Restraint of trade—Severable stipulations - - - - - - **235**
See MASTER AND SERVANT. 2.

INLAND REVENUE.
See under REVENUE.

INSANITY.
See under LUNACY.

INSTALMENTS—Stamp—Agreement for sale of goods—Price to be paid by instalments—Liability to ad valorem stamp duty
See REVENUE. 4. **604**

INSURANCE (LIFE)—*Policy—Proposal Basis of Contract—Effect of Absence of signed Proposal—Estoppel.*

The plaintiff effected with an insurance company a policy of insurance under the seal of the

INSURANCE (LIFE)—*continued.*
company upon the life of her husband, therein called the assured. The policy was expressed to be issued in consideration of the plaintiff having signed a proposal, such proposal being the basis of the contract, and it being stipulated that if the proposal contained any untrue statement as to the state of health of the assured the policy should be void. Upon the death of the assured the plaintiff, who had duly paid the premiums, claimed the amount insured. The company resisted the claim on the ground that the proposal on which the policy had been issued contained misrepresentations as to the assured's health. At the hearing before justices of a complaint for non-payment of the sum insured the plaintiff satisfied the justices that a proposal produced by the company and purporting to be signed by her was not signed by her or with her authority, and she further stated that no proposal at all had been signed by her or with her authority :—

Held, that the company having issued the policy and received the premiums were estopped from contending that in consequence of the want of a proposal there was no contract; that the mere fact that the plaintiff, instead of confining her evidence to the disproof of the proposal put forward by the company, made the admission, irrelevant to her own case, that there had been no proposal at all did not prevent her from taking the benefit of that estoppel; and that the company were liable on the policy. PEARL LIFE ASSURANCE COMPANY *v.* JOHNSON. THE SAME *v.* GREENHALGH - - **Div. Ct. 288**

INTEREST — Copyholds — Compensation — Enfranchisement, Delay in—Quittances
See LANDS CLAUSES ACTS. **374**

INTERLOCUTORY APPLICATION — County court—Appeal to judge from registrar —Order - - - - - - **30**
See COUNTY COURT. 1.

INTERPRETATION ACT, 1889 — Lottery — Offence—" Person "—Corporation **93**
See LOTTERY.

INTERROGATORIES — Workmen's compensation — Discovery — Jurisdiction of county court judge - - - **791**
See EMPLOYER AND WORKMAN. 14.

IRELAND—Police—Pension—Royal Irish Constabulary - - - - - **183**
See POLICE.

JUDGMENT — Company — Arrangement with creditors—Staying proceedings - **368**
See COMPANY.

—— Judgment debt—Married woman—Wearing apparel—Wife's separate estate—Paraphernalia - - - - - **831**
See HUSBAND AND WIFE. 2.

—— Judgment summons—By married woman —Judgment debtor a creditor—Costs in bankruptcy—Set-off - - - **622**
See BANKRUPTCY. 3.

JUDGMENT—*continued.*
—— Judgment summons — Costs in Divorce Court—Order to pay—Default - **430**
See BANKRUPTCY. 2.

JUDICATURE ACT—Lease—Mortgagor in possession—Breach of covenant to repair—Right of mortgagor to sue lessee - **484**
See LANDLORD AND TENANT. 5.

—— Receiver—Appointment—Patent — Equitable execution - - - - **903**
See RECEIVER.

JURISDICTION—Board of Education—Decision —Want of jurisdiction — Certiorari—Mandamus - - - - - **1045**
See EDUCATION.

—— County court judge—Workmen's compensation—Interrogatories — Discovery **791**
See EMPLOYER AND WORKMAN. 14.

—— County court—Practice—New trial, Jurisdiction of judge to grant - - **573**
See COUNTY COURT. 3.

—— Justices—Ouster—Bona fide claim of right —Foreshore - - - - **564**
See JUSTICES. 1.

—— Justices—Summary jurisdiction—Summons —Appearance of defendant by counsel —Warrant to compel personal attendance of defendant - - - **614**
See JUSTICES. 2.

—— Penal servitude — Remanet sentence — Jurisdiction of Court - - - **756**
See CRIMINAL LAW. 7.

—— Summary jurisdiction—Dog licences - **7**
See REVENUE. 2.

—— Summary jurisdiction (Married women).
See under SUMMARY JURISDICTION.

—— Workmen's Compensation Acts.
See under EMPLOYER AND WORKMAN.

JUSTICES — *Jurisdiction — Ouster—Bona fide Claim of Right—Foreshore—Removal of Shingle —Owner—Harbours Act*, 1814 (54 *Geo.* 3, *c.* 159), *ss.* 14, 28.

Sect. 14 of the Harbours Act, 1814, as amended by s. 16 of the Harbours Transfer Act, 1862, provides that no person shall take any shingle from the shore of any harbour, from which the Board of Trade shall by order prohibit the taking of shingle, upon pain of forfeiting for every such offence the sum of 10*l.*; and s. 28 provides that nothing in the Act shall take away any right of property possessed by any person in the shores of a harbour.

The Board of Trade, by order, prohibited the taking of shingle from a part of the shore of a harbour, of which shore the respondent was the owner. The respondent subsequently removed shingle from the shore, and proceedings were taken against him in a Court of summary jurisdiction under s. 14 for the recovery of the penalty. The respondent contended before the justices that he had acted under a bona fide claim of

JUSTICES—*continued.*

right as owner of the shore, and the justices, without considering the question whether the fact of ownership afforded any defence to proceedings under s. 14, dismissed the information on the ground that, a bona fide claim of right having been raised, their jurisdiction was ousted :—

Held, that the decision of the justices was right. BURTON *v.* HUDSON - **Div. Ct. 564**

2. —— *Summary Jurisdiction—Summons—Appearance of Defendant by Counsel—Warrant to compel Personal Attendance of Defendant—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43).

Where in answer to a summons issued by a Court of summary jurisdiction the defendant has appeared by counsel there is no obligation upon him to appear personally, and the justices have no jurisdiction to compel his personal appearance by warrant. THE KING *v.* THOMPSON **Div. Ct. 614**

—— Bread—Sale of, otherwise than by weight—"Fancy bread" - - - - **610**
See BREAD.

—— Criminal law.
See under CRIMINAL LAW.

—— Cruelty to animals—Four animals—Information charging one offence — Four convictions—Validity - - - **748**
See CRIMINAL LAW. 2.

—— Dog licences.
See under REVENUE.

—— Game—Seizure and detention by police officer of partridges' eggs - **415**
See GAME.

—— Insurance (Life)—Policy—Proposal basis of contract—Effect of absence of signed proposal—Estoppel - - - **288**
See INSURANCE (LIFE).

—— Licensing Acts.
See under LICENSING ACTS.

—— London—Building notice—School—Local education authority — Obligation to serve notice - - - - **138**
See LONDON. 1.

—— London — Buildings — Persons altering drains—By-laws—Liability of agents carrying out work - - - **265**
See LONDON. 3.

—— London — Lodging-house — Cleansing — Duty on "landlord" — Validity of by-law - - - - - **127**
See LONDON. 4.

—— Lottery—Offence—Corporation—"Person" *See* LOTTERY - - - - **93**

—— Lunatic who is not a pauper—Application of lunatic's property to his maintenance—Jurisdiction of justice to order - **504**
See LUNACY.

JUSTICES—*continued.*

—— Motor car—Breach of statutory regulation—Mens rea—Negligence—Aiding and abetting—Corporation - - **599**
See MOTOR CAR. 1.

—— Motor car—Exceeding speed limit—Parks regulations—Indorsement of licence
See MOTOR CAR. 2. **269**

—— Penal servitude—Remanet sentence—Jurisdiction of Court - - - **756**
See CRIMINAL LAW. 7.

—— Pistol — Sale — Conditions — For use by purchaser in his house — Reasonable proof - - - - - - **89**
See PISTOL.

—— Practice — Abortive trial — Rehearing — Evidence on former hearing—Evidence on rehearing - - - - **14**
See CRIMINAL LAW. 8

—— Privies—Undertaking by local authority to cleanse—Neglect of duty—Reasonable excuse - - - - - - **511**
See LOCAL GOVERNMENT. 2.

—— Rates—Tenement wholly let out in apartments—Owner—Agent to collect rents—Rateability — Representation of the people - - - - - - **625**
See RATES.

—— Refuse, Removal of—Restaurant—House or trade refuse—Public Health (London) Act, 1891 - - - - - **588**
See LONDON. 5.

—— Summary jurisdiction (Married women)—Separation order—Order for maintenance of wife—Non-payment by husband—Committal to prison - - - **851**
See SUMMARY JURISDICTION.

LANDLORD AND TENANT — *Distress — Fixtures—Advertisement Hoardings—Right to Distrain.*

By an agreement in writing the defendants agreed to let and the plaintiffs to take the exclusive right of putting up advertisement hoardings and posting bills thereon upon specified land of the defendants for seven years, the plaintiffs paying the defendants a fixed annual sum, payable quarterly; rates and taxes to be paid by "the tenants." The plaintiffs erected hoardings, which were affixed in a very substantial manner to the land, and exhibited advertisements upon them. The plaintiffs fell into arrear in their payments under the agreement, and the defendants levied a distress upon the hoardings and ultimately carried them away and sold them. The plaintiffs brought an action to recover damages for wrongful distress, and the defendants counter-claimed for the amount of the arrears due under the agreement :—

Held that, even assuming the agreement created the relation of landlord and tenant between the parties, the advertisement hoardings, although removable by the plaintiffs at the end of the tenancy, were fixtures and not mere

LANDLORD AND TENANT—*continued.*

chattels, and were therefore not distrainable, and the plaintiffs were entitled to recover damages for the wrongful distress.

Darby v. *Harris*, (1841) 1 Q. B. 895, approved and followed.

Held, further, that the plaintiff company having gone into liquidation, it would be inequitable to set off the damages recovered by the plaintiffs on the claim against the arrears recovered by the defendants on the counter-claim and to give judgment for the balance, and that separate judgments ought to be given on the claim and counter-claim respectively.

Semble, that the agreement did not constitute a demise creating a tenancy, but amounted only to a licence to enter on the land and do certain specified things upon it. PROVINCIAL BILL POSTING COMPANY *v.* LOW MOOR IRON COMPANY - - - - - - - **C. A. 344**

2. —— *Distress for Rent — Rent due on Sunday—Legality of Distress levied on following Monday.*

At common law Sunday is not a dies non.

Rent may lawfully be paid by a tenant on a Sunday. Therefore where it is due on that day, and is not paid, it will be in arrear on the following Monday, and the landlord may then lawfully levy a distress for it. CHILD *v.* EDWARDS - - - - - - **Ridley J. 753**

3. —— *Forfeiture—Relief—Writ claiming Possession—Election to determine Tenancy—Underlease — Relief granted to Assignee of Lessee—Effect on Underlease—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

A lease of premises contained a covenant by the lessee to keep the premises in repair, and there was a proviso for re-entry upon breach of any covenant in the lease. The lessee sub-let the premises to the defendant, the underlease containing a covenant to repair similar to that in the head lease and a similar proviso for re-entry. The premises having become out of repair, the lessor issued a writ against the lessee to recover possession thereof. The lessee thereupon assigned to the plaintiff the term granted by the lease and the benefit of the arrears of rent, and the plaintiff applied for and obtained an order under s. 14, sub-s. 2, of the Conveyancing and Law of Property Act, 1881, that all further proceedings in the action should be stayed, and that the plaintiff should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The plaintiff then brought an action against the defendant to recover rent due upon the underlease subsequent to the issue and service of the writ by the lessor to recover possession of the premises :—

Held that, though the issue and service of the writ by the lessor to recover possession operated as a final election by him to determine the lease, the effect of the subsequent order for relief was to restore the lease as if it had never become forfeited, and therefore the underlease also remained in existence, and the plaintiff was entitled to recover the amount claimed. DENDY *v.* EVANS - - - - - **Darling J. 894**

LANDLORD AND TENANT—*continued.*

4. —— *Lease — Beerhouse — Covenant by Lessee to use Premises only as Beerhouse—Non-renewal of Licence—Impossibility of performing Covenant—Continuance of Lease—Compensation —Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 2, *sub-s.* 1.

By an indenture of lease made in 1895 the plaintiff demised to the defendant certain premises described as "all that beerhouse and premises with the bakehouse in the rear" for a term of twenty-one years. The lease contained covenants by the defendant to continue the premises as a beerhouse at all times during the term and not to use the premises or permit them to be used in any other manner than as a beerhouse without the consent of the plaintiff. The house had been licensed as a beerhouse since before the passing of the Wine and Beerhouse Act, 1869. In 1905 the renewal of the licence was refused under the Licensing Act, 1904, on the ground that it was not necessary for the requirements of the neighbourhood, and in August, 1907, compensation was paid to the plaintiff and the defendant.

In an action to recover a half-year's rent due in January, 1908 :—

Held, that the non-renewal of the licence had not the effect of putting an end to the lease, and that the defendant was therefore liable for the rent. GRIMSDICK *v.* SWEETMAN **Div. Ct. 740**

5. —— *Lease — Mortgagor in Possession — Breach of Covenant to Repair—Right of Mortgagor to sue Lessee—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), s. 25, *sub-s.* 5.

The Conveyancing and Law of Property Act, 1881, s. 10, gives to a mortgagor entitled to possession or to receipt of the rents and profits of land subject to a lease, whose mortgagee has neither taken possession nor given notice of his intention to take possession, the right to sue the lessee for damages for breach of a covenant to repair contained in the lease.

The Judicature Act, 1873, s. 25, sub-s. 5, gives the mortgagor no such right. TURNER *v.* WALSH **C. A. 484**

—— Licensing Acts — Compensation — Charge on renewed licence—Deduction from rent — Unexpired term — Successive leases - - - - - - - **884**
See LICENSING ACTS. 1.

LANDS CLAUSES ACTS—*Copyholds—Enfranchisement — Compensation — Delay in Enfranchisement — Interest — Quittances — Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 95, 96, 97.

In 1901 certain copyhold land was, under the powers of the Burial Acts, 1852 to 1900, and the Lands Clauses Act, 1845, purchased from the copyhold tenants thereof by the local authority of the district for the purpose of a burial ground, and the conveyance was duly enrolled on the court rolls of the manor. The local authority entered into possession, and negotiations proceeded between the lord of the manor and the local authority as to the amount of

LANDS CLAUSES ACTS—*continued.*
compensation payable to the lord for the enfranchisement of the land in pursuance of s. 96 of the Lands Clauses Act, 1845, and these negotiations were continued until 1908, when it was agreed to refer the matter to an arbitrator. No blameworthy delay had occurred. The lord continued in possession of all manorial rights, and all rents had been paid to him. The lord claimed compensation for, among other things, the loss of quittances, and also interest upon the compensation money from the date of the obligation to enfranchise to payment. A quittance was a customary charge of 4*d.* for every receipt which a copyholder required to be given to him in respect of any manorial payment, but the charge could not be enforced if a copyholder was content to make the payment without requiring a receipt. The arbitrator awarded compensation for the loss of the quittances, and with regard to the claim for interest he found that the rents received by the lord were not an equivalent for the interest, and he awarded interest at the rate of 4 per cent. per annum :—

Held, that the lord was entitled under s. 96 of the Lands Clauses Act, 1845, to compensation for the loss of the quittances ; and that, upon the principle laid down in *In re Marquis of Salisbury and London and North Western Ry. Co.*, [1892] 1 Ch. 75, n., he was entitled to interest upon the compensation money at the rate of 4 per cent. per annum, deducting therefrom the amount of the rents received by him. *In re* DUKE OF NORTHUMBERLAND AND TYNEMOUTH CORPORATION **Phillimore J. 374**

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

LEVEL CROSSING—Approaches to crossings—Repair of roadway of approaches - **403**
See RAILWAY. 2.

LIBEL.
See under DEFAMATION.

LICENCE—Dog licences.
See under REVENUE.

—— Licensing Acts.
See under LICENSING ACTS.

—— Motor car.
See under MOTOR CAR.

LICENSING ACTS—*Compensation — Charge on renewed Licences — Deduction from Rent — Unexpired Term—Successive Leases—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3, *sub-s.* 3 ; *Sched. II.*

By s. 3, sub-s. 1, of the Licensing Act, 1904, quarter sessions are directed, when necessary, to impose in respect of all existing on licences renewed in respect of premises within their area charges at the rate specified. By sub-s. 3 such deductions from rent as are set out in Sched. II. to the Act may be made by any licence-holder who pays a charge under the section, and also by any person from whose rent a deduction is made in respect of the payment of such a charge. By Sched. II. to the Act a person whose unexpired term does not exceed two years may deduct a sum equal to 88 per cent. of the charge, and a person whose unexpired term exceeds twenty-five but does not exceed thirty years may deduct a sum equal to 7 per cent. of the charge.

The defendants were lessees of a public-house under a lease which expired at Christmas, 1909 ; they were also grantees of a lease of the same public-house for a term commencing from the day but one next after the date of the expiration or sooner determination of the aforesaid lease and enduring until Midsummer, 1935. Quarter sessions having in the year 1908 imposed a charge in respect of the public-house under s. 3 of the Act :—

Held, that the unexpired term of the defendants included the reversionary lease as well as the lease in possession, and that they were persons whose unexpired term exceeded twenty-five but did not exceed thirty years, and that they were consequently entitled to deduct 7 per cent. and no more of the charge. LORD LLANGATTOCK *v.* WATNEY, COMBE, REID & CO.
A. T. Lawrence J. 884

2. —— *Compensation on refusal to renew Licence—Tenants in Common of Lease of Licensed Premises—Action for Sale of Premises in lieu of Partition—Judgment by consent for Sale, and Payment of Proceeds into Court — Refusal of Licence under Licensing Act*, 1904, *before Sale —Award of Compensation—Division of Compensation among Persons interested—Whole of Compensation in respect of Leasehold Interest apportioned to one Tenant in Common—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *ss.* 1, 2—*Licensing Rules*, 1904, *rr.* 21—27.

The plaintiffs, who claimed that they and others, being the children of one J. R., deceased, were interested as tenants in common with the defendant in a lease of certain licensed premises, of which the defendant was in possession through his tenant, brought an action in the Court of Chancery of the County Palatine of Durham, asking for a sale of the property in lieu of partition. In that action the defendant consented to judgment for an inquiry as to who were the persons interested in the property, and for an account of the rents and profits received by him ; and by this judgment by consent it was further ordered that, if it were certified by the registrar of the Court that all persons interested in the property who were necessary parties were before the Court, the property should be sold with the approbation of the registrar, and the money to arise by the sale should be paid into Court to the credit of the action, subject to further order. By the certificate of the registrar made in pursuance of the judgment, it appeared that the plaintiffs and the other children of J. R. were entitled to one moiety, and the defendant was entitled to the other moiety, of the leasehold interest. Before any sale of the property was effected, the renewal of the licence in respect of the premises was refused by the compensation authority under the Licensing Act, 1904, ss. 1, 2, and the amount to be paid as compensation to the persons interested in the premises was determined by the Inland Revenue Commissioners under s. 2,

LICENSING ACTS—*continued.*

sub-s. 2, of that Act to be 900*l.* A supplemental meeting of the compensation authority was subsequently held under the Licensing Rules, 1904, to determine the shares in which the compensation money should be divided amongst the persons interested in the premises. The Ecclesiastical Commissioners, who were the owners of the reversion on the lease, made no claim to any portion of the amount. A claim was made at the supplemental meeting on behalf of the children of J. R., who had not sent to the compensation authority any notice of claim as required by r. 21 of the Licensing Rules, 1904, to be treated as interested in the licensed premises, but the compensation authority refused to entertain their claim, or to hear them, on the ground that they had not complied with the provisions of r. 21, and proceeded to apportion the amount of the compensation as follows, namely, 835*l.* to the defendant, who had been registered as the owner of the premises in the register of licences, and 65*l.* to the holder of the licence, his tenant. The defendant having received the 835*l.* so apportioned, an application was made on behalf of the children of J. R. for an order that he should bring that sum into Court, and the Chancellor of the County Palatine granted that application :—

Held, affirming his decision, that the determination of the compensation authority with regard to the shares in which the compensation was to be divided between the various interests in the premises did not determine the rights of the co-owners of the leasehold interest in the licensed premises inter se, and that the defendant was bound to bring the amount paid to him into Court to the credit of the action. BIRKIN *v.* SMITH - - - - - - - **C. A. 112**

3. —— *Six-day Licence — Premises to be closed "during the whole of Sunday"—Christmas Day and Good Friday—Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 49—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 3.

By s. 49 of the Licensing Act, 1872, the holder of a six-day licence "shall keep his premises closed during the whole of Sunday." By s. 3 of the Licensing Act, 1874, which regulates the hours of closing of licensed premises generally, "such premises wherever situate shall be closed on Christmas Day and Good Friday . . . . as if Christmas Day and Good Friday were respectively Sunday" :—

Held, that the holder of a six-day licence is not bound to close his licensed premises during the whole of Christmas Day when it falls on a day other than a Sunday, but is only bound to close on that day during the hours of closing applicable to licensed premises generally. DAVIES *v.* HARRISON - - - **Div. Ct. 104**

—— Income tax — Deductions — Profits of brewery—Tied licensed houses—Compensation charge - - - - **912**
See REVENUE. 3.

—— Lease—Beerhouse—Non-renewal of licence —Impossibility of performing covenant —Continuance of lease—Compensation
See LANDLORD AND TENANT. 4. **740**

LICENSING RULES, 1904, rr. 21—27 - 112
See LICENSING ACTS. 2.

LIEN—Ship — Charterparty —Demurrage payable day by day—"Charges" - **998**
See SHIPPING. 2.

LIMITATIONS—*Specialty Debt—Bond — Joint and several Liability — Acknowledgment in Writing — "Party liable by virtue of such specialty"—Acknowledgment by One of several Obligors — Lost Acknowledgment — Parol Evidence—Onus of Proof — Civil Procedure Act*, 1833 (3 *&* 4 *Will.* 4, *c.* 42), *ss.* 3, 5.

An acknowledgment in writing by one of several obligors is an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, so as to take out of the operation of s. 3 of that Act an action founded on the liability of the surviving obligors, and stands on the same footing as payment.

Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost. Onus of proof discussed.

Decision of Channell J., [1909] 1 K. B. 577, affirmed. READ *v.* PRICE - - - **C. A. 724**

LIQUIDATION—Bankruptcy.
See under BANKRUPTCY.

LOCAL AUTHORITY.
See under LOCAL GOVERNMENT.

LOCAL GOVERNMENT—*Building — Conversion of Building into Dwelling-house—"New Building"—Breach of By-law—Right to remove, alter, or pull down Building—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 157, 159.

By s. 157 of the Public Health Act, 1875, every urban authority may make by-laws with respect to (inter alia) the structure of new buildings, and may provide for the observance of those by-laws by enacting therein such provisions as they think necessary as to the power of the authority to remove, alter, or pull down any work begun or done in contravention of the by-laws. By s. 159 of the above-mentioned Act, "for the purposes of this Act . . . . the conversion into a dwelling-house of any building not originally constructed for human habitation . . . . shall be considered the erection of a new building."

By a by-law made by an urban council it was provided that, if any work to which any of their by-laws relating to new buildings might apply were begun or done in contravention of any such by-law, the person by whom the work was so begun or done, by a notice in writing, should be required to shew sufficient cause why the work should not be removed, altered, or pulled down ; and, if he failed to do so, the council should be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work.

The owner of an old railway carriage, which stood upon a plot of land within the district of the above-mentioned urban council belonging to him, converted it into a dwelling by removing the seats, making an opening through a partition inside, putting in a stove and chimney, and

LOCAL GOVERNMENT—*continued.*
erecting an earth closet outside it, and then resided in it with his wife and children. The structure thus formed did not comply with the by-laws relating to new buildings made by the urban council under s. 157 of the Public Health Act, 1875. The urban council, after due notice to the owner, pulled down the whole building :—

Held (affirming the judgment of a Divisional Court, [1909] 1 K. B. 263), that the whole structure, when converted into a dwelling-house, became, by virtue of s. 159 of the Public Health Act, 1875, a new building subject to the by-laws relating thereto, and, as it did not comply with the requirements of those by-laws, the urban council had power to pull down the whole building, and not merely to remove and alter the work by which it was so converted as aforesaid. HANRAHAN *v.* LEIGH-ON-SEA URBAN DISTRICT COUNCIL - - - - **C. A. 257**

2. —— *Privies — Undertaking by Local Authority to cleanse — Limited Undertaking — Neglect of Duty—Reasonable Excuse — Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 42, 43.

By s. 42 of the Public Health Act, 1875, "Every local authority may . . . . themselves undertake . . . . the cleansing of . . . . privies . . . . either for the whole or any part of their district." And by s. 43 a local authority who, having so undertaken, fail "without reasonable excuse" to cleanse the privies of any house shall be liable to a penalty.

A local Act provided that all privies in a certain borough should be subject to the approval of the corporation. The corporation as the local authority of the borough undertook for the whole of their district the cleansing of all privies that had received their approval. The appellants, who occupied premises in the borough, laid an information against the corporation under s. 43 for neglecting to cleanse their privies. The privies in question had not been approved by the corporation :—

Held, (1.) that the words "any part of their district" in s. 42 referred to a particular area, and had no reference to a class of houses in the district, and that the limitation which the corporation attached to their undertaking was inoperative ; (2.) that the undertaking being treated as applying to all houses in the district, the non-approval of the privies by the corporation was not a "reasonable excuse" for their neglecting to cleanse them within the meaning of s. 43. PEGG & JONES, LIMITED *v.* DERBY CORPORATION - - - - **Div. Ct. 511**

LOCOMOTIVES—Extraordinary traffic—Timber haulage—Staple trade of district - **845**
See HIGHWAY.

—— Motor car.
See under MOTOR CAR.

LODGING-HOUSE—Cleansing—Duty on "landlord"—Validity of by-law - - **127**
See LONDON. 4.

LONDON — *Building Notice — School — Local Education Authority—Obligation to serve Notice*
LONDON—*continued.*
—London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 145, 201.

The appellants as the local education authority for London commenced to erect a building to be used as a public elementary school.

By the code of building regulations for public elementary schools issued by the Board of Education in pursuance of the Education Acts, 1870 to 1902, such buildings are required to comply with the provisions therein stated as to the height and dimensions of the rooms, corridors, and staircases, the construction of the walls, floors, roofs, and staircases, the lighting, ventilating, and warming of the buildings, and the sanitary arrangements in connection with them.

By s. 201, sub-s. 5, of the London Building Act, 1894, "public buildings occupied for public purposes by the County Council of London" are exempt from the operation of the portion of that Act relating to the construction of buildings.

The appellants did not before commencing to build serve a building notice upon the district surveyor in accordance with s. 145 of the said Act :—

Held, that the appellants were not exempt from the obligation to serve a building notice either by the fact that the building was a public elementary school and as such subject to the jurisdiction of the Board of Education, or that it was a "public building occupied" by the appellants "for public purposes," or that the district surveyor was an officer appointed and dismissible by the appellants. LONDON COUNTY COUNCIL *v.* DISTRICT SURVEYORS' ASSOCIATION AND WILLIS - - - - - **Div. Ct. 138**

2. —— *Buildings—General Line of Buildings in Street—Buildings erected beyond the General Line — Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings—Metropolis Management Amendment Act*, 1862 (25 *&* 26 *Vict. c.* 102), *s.* 75 (*repealed*) *—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 22, 27, 216.

By s. 75 of the Metropolis Management Amendment Act, 1862 (which section was repealed by the London Building Act, 1894), it was provided that no building should, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street or within fifty feet of the highway, such general line of buildings to be decided by the superintending architect to the board ; and any building so erected without such consent was liable to be demolished as therein provided. Sect. 22 of the London Building Act, 1894, in substance, re-enacted the provisions of the above-mentioned section, substituting the London County Council and their superintending architect for the Metropolitan Board of Works and their architect. By s. 27 of the London Building Act, 1894, the consent of the London County Council to the erection of any building beyond the general line of buildings in any part of a street, or the erection of such building, shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent. By s. 216 of that Act all by-laws, regulations, orders, consents, conditions, and notices duly

LONDON—*continued.*

made, given, imposed, or issued under any Act repealed by that Act are, so far as applicable for the purposes of the Act, to be of the same validity and effect as if they had been made, given, imposed, or issued under the provisions of that Act.

The superintending architect appointed by the London County Council was called upon to define the general line of buildings in a part of a certain street in the metropolis in the following circumstances. Along the part of the street in question stood a number of old houses built before the year 1862. In front of these houses, and between them and the pavement line of the street, there were originally forecourts or open spaces. At the date of the application to the superintending architect there had been erected, with the consent of the Metropolitan Board of Works, upon the forecourts or open spaces in front of a number of the old houses, shops of one storey projecting from the fronts of the old houses up to the pavement line of the street. The consent of the board to the erection of each of these shops was given upon the condition that it should be of one storey only, and should not be at any time altered or raised without the consent of the board.

The superintending architect certified that the frontage line of the old houses was the general line of buildings in the part of the street in question. On appeal from this decision under s. 25 of the London Building Act, 1894, to the tribunal of appeal constituted under s. 175 of the Act, that tribunal, taking into consideration the shops so erected as aforesaid, fixed as the general line of buildings in that part of the street the frontage line of these shops. On a case stated by the tribunal of appeal, the Divisional Court held that under the circumstances there was nothing in point of law to prevent them from so deciding :—

Held by the Court of Appeal (Fletcher Moulton L.J. and Farwell L.J., Sir J. C. Bigham, President, dissenting), that the erection of the shops as aforesaid could not have the effect of altering the original general line of buildings, and therefore the tribunal of appeal were wrong in taking those shops into consideration in fixing the line of buildings.

Decision of Divisional Court, reported [1909] 1 K. B. 116, reversed. LONDON COUNTY COUNCIL *v.* METROPOLITAN RAILWAY COMPANY - - - - - - - **C. A. 317**

3. —— *Buildings—Persons altering drains—By-laws—Liability of Agents carrying out Work.*

By-laws of the London County Council provided that "Any person who shall construct or reconstruct any pipe communicating with sewers" in connection with a building "shall cause every pipe in such building for carrying off waste water to a sewer to discharge in the open air over a properly trapped gully," and that "Every person who shall make any addition to or alter any pipes communicating with a sewer" shall cause a deposit to be made with the sanitary authority of the plans and particulars of the proposed addition or alteration.

LONDON—*continued.*

A plumber was employed by the owner of a house to execute certain work in the house involving the alteration and reconstruction of certain pipes communicating with the sewer. In carrying out the work the plumber caused a waste pipe from a sink to discharge otherwise than in the open air over a properly trapped gully. Whether he did so by the orders of the owner did not appear. He also neglected to deposit plans of the proposed alteration :—

Held, that the mere fact that he did the work did not constitute him a person reconstructing or altering the pipes within the meaning of the by-laws so as to render him liable to penalties for their breach. KERSHAW *v.* BROOKS. **Div. Ct. 265**

4. —— *Lodging-house—Cleansing—Duty on "Landlord" — Validity of By-law — Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 94, *sub-s.* 1 (*e*) ; *s.* 116.

A by-law made by the council of a metropolitan borough under s. 94 of the Public Health (London) Act, 1891, required the landlord of a lodging-house to cause every part of the premises to be cleansed in the month of April, May, or June in every year. "Landlord" was defined as the person for the time being receiving the rack rent of the lodging-house, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack rent ; and "lodging-house" was defined as a house or part of a house let in lodgings or occupied by members of more than one family, where the rent payable per week was below a certain sum. A penalty was imposed for breach of the by-law, but proceedings were not to be taken against the landlord until he had failed, after notice, to comply with the by-law :—

Held, that the by-law was unreasonable and bad, inasmuch as it applied to the case of a landlord who had let the house and had no right of entry, and who would therefore commit an act of trespass if he complied with the requirements of the by-law. ARLIDGE *v.* ISLINGTON CORPORATION - - - - **Div. Ct. 127**

5. —— *Removal of Refuse — Restaurant — House or Trade Refuse—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *ss.* 30, 33, 141.

The refuse of a restaurant, consisting of ashes, clinkers, coffee grounds, egg shells, dust and general dirt, broken crockery, tea leaves, parings and scrapings, &c., is house refuse within the meaning of s. 30 of the Public Health (London) Act, 1891, which the sanitary authority is bound to remove without payment.

Westminster Corporation v. *Gordon Hotels, Ld.*, [1906] 2 K. B. 39, applied. J. LYONS & CO. *v.* LONDON CORPORATION - **Div. Ct. 588**

—— Mayor's Court—Practice—Notice of appeal —Service on Sunday - - - **100**
See MAYOR'S COURT.

LOTTERY—*Offence—Corporation—"Person"—Joint Stock Company—Lotteries Act*, 1823 (4 *Geo.* 4, *c.* 60), *ss.* 41, 67—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 2, *sub-s.* 1.

The Lotteries Act, 1823, s. 41, enacts that if

LOTTERY—*continued.*
any person shall publish any proposal or scheme for the sale of chances in a lottery, not authorized by Act of Parliament, such person shall for every such offence be deemed a rogue and vagabond, and shall be punished as such in the manner thereinafter directed. By s. 67 the punishment is imprisonment, and for a second offence imprisonment and whipping. By s. 4 of the Summary Jurisdiction Act, 1879, a fine may be imposed instead of imprisonment :—

Held, that a joint stock company incorporated under the Companies Acts cannot be convicted of an offence under s. 41. HAWKE *v.* E. HULTON & Co. - - - - - **Div. Ct. 93**

LUGGAGE — Passengers'— Ship — Contract of carriage—Theft by shipowners' servants
See SHIPPING. 4. **987**

LUNACY—*Lunatic who is not a Pauper—Order for Reception into Asylum—Classification as Private Patient—Application of Lunatic's Property to his Maintenance—Jurisdiction of Justice to order—"Chargeable to any Union or Local Authority"—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 13, 299 ; *Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 3.

A person for whose reception and detention in a county lunatic asylum an order has been made under s. 13 of the Lunacy Act, 1890, is a person "chargeable to a union or local authority" within the meaning of s. 299 of that Act, and a justice has jurisdiction under the latter section to order any property of the lunatic to be seized and applied to the expenses of his maintenance, none the less because at the time of the application for that order the lunatic has been "classified as a private patient" in accordance with the provisions of s. 3 of the Lunacy Act, 1891. THE KING *v.* FULHAM GUARDIANS **Div. Ct. 504**

—— Criminal lunatic—Person totally deaf—Incapacity to understand proceedings
See CRIMINAL LAW. 6. **81**

MAGISTRATES.
See under JUSTICES.

MAINTENANCE—Lunatic.
See under LUNACY.

—— Separation order—Order for maintenance of wife—Non-payment by husband—Absence of evidence of means—Committal to prison - - - - **851**
See SUMMARY JURISDICTION.

MANDAMUS—Board of Education—Decision—Want of jurisdiction—Certiorari - **1045**
See EDUCATION.

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MARRIED WOMEN'S PROPERTY ACT, 1882
See HUSBAND AND WIFE. 2. **831**

MASTER AND SERVANT — *Compensation—"Seaman"—Employers and Workmen Act*, 1875 (38 & 39 *Vict. c.* 90), *s.* 13—*Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 8.

In interpreting the Employers' Liability Act, 1880, which excludes seamen from its operation, "seaman" ought not to be defined by reference to the definition in the Merchant Shipping Act, 1854, but bears its ordinary meaning.

Dictum of Lord Alverstone C.J. in *Corbett* v. *Pearce*, [1904] 2 K. B. 422, overruled.

The plaintiff was employed with other men by the defendants, the owners of a steamship, in warping the vessel from one berth to another across a large dock connected with a tidal river. He was not a member of the crew of the vessel. Whilst engaged in unmooring the vessel from the side of the dock where she was then lying and passing ropes to a tug and to the quay alongside which she was to be moored he sustained personal injuries. The vessel was taken across by means of the tug and a rope and was during this operation at no moment entirely free from a quay. She was not using her own steam or any motive power of her own.

In an action brought by the plaintiff under the Employers' Liability Act, 1880, against the defendants to recover damages for the personal injuries sustained by him whilst in their employment :—

Held, that he was not a "seaman" and was consequently not excluded from the operation of the Act.

The decision of a Divisional Court (Bigham and Walton JJ.), [1909] 2 K. B. 36, reversed. CHISLETT *v.* MACBETH & Co. - - **C. A. 811**

2. —— *Contract — Infant — Restraint of Trade — Severable Stipulations — Contract for Benefit of Infant—Injunction.*

An infant's contract of service is not necessarily invalid because it contains stipulations some of which are void as being in restraint of trade and unnecessary for the protection of the master's business. If the void stipulations are severable from the rest of the contract they may be disregarded, and the rest of the contract is binding on the infant if it is for his benefit. BROMLEY *v.* SMITH - - **Channell J. 235**

—— Employer and workman.
See under EMPLOYER AND WORKMAN.

MAXIM—"Res ipsa loquitur" - - - **652**
See NUISANCE.

MAYOR'S COURT—*Practice—Notice of Appeal—Time within which Notice must be served—Service on Sunday—Sunday Observance Act*, 1677 (29 *Car.* 2, *c.* 7), *s.* 6—*Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 8.

By s. 8 of the Mayor's Court of London Procedure Act, 1857, notice of appeal from the determination or direction of the Court in point of law or upon the admission or rejection of any evidence shall be given "within two days after such determination or direction" :—

Held, that if the period of two days expires

MAYOR'S COURT—*continued.*
on a Sunday the notice of appeal may be given on the following Monday.
Reg. v. *Middlesex Justices*, (1848) 17 L. J. (M.C.) 111, followed. MILCH *v.* FRANKAU & Co. **Div. Ct. 100**

MEDICAL PRACTITIONER—Examination of workman by—Employer's right—Condition—Workman requiring presence of his own medical man - - - **802**
See EMPLOYER AND WORKMAN. 11.

MERCHANT SHIPPING.
See under SHIPPING.

METROPOLIS.
See under LONDON.

MINES — *Coal Mine — Negligence— Statutory Duty—Master and Servant—Common Employment—Coal Mines Regulation Act*, 1887 (50 *&* 51 *Vict. c.* 58), *s.* 49, *r.* 12—*Coal Mines Regulation Act*, 1896 (59 *&* 60 *Vict. c.* 43), *s.* 6.

The duty thrown on a mine-owner by the general rules as to the use of explosives in a mine contained in the Coal Mines Regulation Acts, and the special statutory rules made thereunder, is an absolute duty, and not merely a duty to take all reasonable means, by publishing and to the best of his power enforcing the rules as regulations for the working of the mine, to prevent their contravention.

The plaintiff brought an action for damages for the death of her husband through an explosion in the plaintiffs' mine caused by the firing of a shot in contravention of the rules under the Coal Mines Regulation Acts. It was proved that the explosion was caused by the shot, and that serious breaches of the rules had been committed in firing it; but these breaches were committed without the knowledge of the defendant company, and there was no evidence that they had been guilty of any personal negligence, or that they had or had not properly published the rules and done all that was reasonably possible to prevent their contravention :—

Held by Fletcher Moulton and Buckley L.JJ. (Cozens Hardy M.R. dissenting), that the defendant company were civilly liable for breach of the duty imposed upon them by the Coal Mines Regulation Acts with regard to the use of explosives in the mine without proof of negligence. DAVID *v.* BRITANNIC MERTHYR COAL COMPANY - - - - - - - **C. A. 146**

MONEY-LENDER—*Business carried on at other than registered Address — Loan effected at Borrower's Residence—Isolated Transaction—Illegality—Bill of Sale invalid—Money-lenders Act*, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*b*).

The Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*), prohibits a money-lender from carrying on business at any other address than his registered address. Therefore, where, in the case of a loan by registered money-lenders in the way of their business, the transaction was entirely carried out at the house of the borrower :—

Held that, even if the transaction were an isolated one, and not in accordance with the usual course of the money-lender's business, it

MONEY-LENDER—*continued.*
was illegal as being in contravention of the Money-lenders Act, 1900, s. 2, sub-s. 1 (*b*). and consequently void. GADD *v.* PROVINCIAL UNION BANK - - - - - - - **C. A. 353**

MORTGAGE—Lease—Mortgagor in possession—Breach of covenant to repair—Right of mortgagor to sue lessee - - **484**
See LANDLORD AND TENANT. 5.

MOTOR CAR—*Conditions of User—Identification Plate—Lamp—Breach of Statutory Regulation —Mens rea—Negligence—Aiding and abetting—Corporation — Locomotives on Highways Act*, 1896 (59 *&* 60 *Vict. c.* 36), *s.* 6—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 7—*Motor Car (Registration and Licensing) Order*, 1903, *art.* 11.

Article 11 of the Motor Car (Registration and Licensing) Order, 1903, made by the Board of Trade under the Motor Car Acts, 1896 and 1903, provides that whenever during the period between one hour after sunset and one hour before sunrise a motor car is used on a public highway a lamp shall be kept burning on the car, so contrived as to illuminate, by means of reflection, transparency, or otherwise, and render easily distinguishable every letter or figure on the identification plate fixed on the back of the motor car.

By s. 7 of the Locomotives on Highways Act, 1896 (which is one of the Motor Car Acts, 1896 and 1903), a breach of any regulation made under that Act may, on summary conviction, be punished as therein provided.

The appellants, a limited company, who were motor cab proprietors, were convicted before a magistrate of aiding and abetting a driver in their service in using a motor cab in contravention of the above regulation on the following facts :—The driver was using a motor cab more than one hour after sunset having a lamp, which was lighted, hanging too low to illuminate the identification plate. The motor cab was fitted with a proper and permanent bracket on which to hang the lamp. The appellants had in their service a foreman who was charged by them with the duty of seeing that the cabs left their premises in such a condition as to comply in all respects with the Motor Car Acts, 1896 and 1903, and the regulations of the Board of Trade made thereunder. The magistrate found that the appellants were careless in not seeing to it that a proper lamp was fixed on the cab :—

Held, that there was evidence on which the appellants might be convicted of aiding and abetting their driver in committing a breach of the above regulation. PROVINCIAL MOTOR CAB COMPANY *v.* DUNNING - - **Div. Ct. 599**

2. —— *Exceeding Speed Limit—Parks Regulations—Indorsement of Licence—Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 4.

A Court before whom a person is convicted of a third offence of driving a motor car in a royal park at a speed exceeding the limit prescribed by the parks regulations has power to indorse the driver's licence under s. 4 of the Motor Car Act, 1903, notwithstanding that the parks regulations prescribing the speed limit were not made until after the Motor Car Act

MOTOR CAR—*continued.*
1903, had come into force. THE KING *v.* PLOWDEN - - - - - **Div. Ct. 269**

MOTOR CAR (REGISTRATION AND LICENSING) ORDER, 1903, art. 11 - **599**
See MOTOR CAR. 1.

MOTOR OMNIBUS — Negligence — Accident to passenger — Doctrine of "res ipsa loquitur" - - - - - - **652**
See NUISANCE.

NEGLIGENCE—*Corporation—County Council—Liability for Negligence—Obligation to maintain School Premises—Injury to Pupil caused by Defect of Asphalte of Playground—Elementary Education Act*, 1870 (33 & 34 *Vict. c.* 75)—*Board of Education Act*, 1899 (62 & 63 *Vict. c.* 33)—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42).

The plaintiff, a pupil at a public elementary school provided by the defendants, the Surrey County Council, as the local education authority, caught his foot, while playing in the playground attached to the school, in a hole existing in the asphalte of the playground, and fell and was seriously hurt. He brought an action by his next friend against the defendants to recover damages for the injuries so sustained by him. The jury found that his injuries were caused by the negligence of the defendants :—

Held, that the action lay, inasmuch as the joint effect of s. 14 and that portion of s. 18 of the Elementary Education Act, 1870, which is unrepealed by the Education Act, 1902, coupled with ss. 5 and 7 of the Act of 1902, is to cast upon the defendants the duty of keeping the playground in proper repair for the use of pupils attending the school, and in the performance of that duty the defendants were not acting in a ministerial capacity only.

Tozeland v. *West Ham Union*, [1907] 1 K. B. 920, distinguished. CHING *v.* SURREY COUNTY COUNCIL - - - - - **Bucknill J. 762**

—— Cheque drawn by directors on behalf of company—Forgery - - - **1010**
See BANKER.

—— Master and servant—Ship—"Seaman"—Workman - - - - - - **36**
See EMPLOYER AND WORKMAN. 20.

—— Motor omnibus—Accident to passenger—Doctrine of "res ipsa loquitur" - **652**
See NUISANCE.

—— Public hospital—Liability of governors—Operation—Injury to patient—Hospital staff –Relation of hospital to patients
See HOSPITAL. **820**

—— Statutory duty — Master and servant — Common employment - - - **146**
See MINES.

—— Tramway company — Common carrier of passengers — Liability for personal injuries - - - - - - **858**
See CARRIER.

NERVOUS PROSTRATION — Workmen's compensation—Loss of will power - **73**
See EMPLOYER AND WORKMAN. 17.

NEWSPAPER—Libel in—Publication — Intention to defame plaintiff - - **444**
See DEFAMATION. 2.

—— Libel — Parliamentary paper — Printing extract from—Privilege—Communication published in newspaper — Fair comment - - - - - - **958**
See DEFAMATION. 3.

NEW TRIAL.
See under TRIAL.

NOTICE—London—Building notice — Schools—Local education authority—Obligation to serve notice - - - - **138**
See LONDON. 1.

—— Mayor's Court—Practice—Notice of appeal —Time—Service on Sunday- - **100**
See MAYOR'S COURT.

NUISANCE — *Negligence — Motor Omnibus — Accident to Passenger — Doctrine of "res ipsa loquitur."*

A motor omnibus belonging to the defendants, in which the plaintiff was a passenger, "skidded" upon a road the surface of which was greasy from rain, and ran into an electric light standard, and the plaintiff was in consequence injured. At the trial of an action brought by the plaintiff in the county court in respect of the injury so occasioned to her, there was no evidence given for the plaintiff of anything (beyond the above-mentioned facts) in the nature of negligence on the part of any servant of the defendants in the driving or management of the omnibus, or of any defect in the construction or condition of the particular omnibus, or that motor omnibuses generally were of such a character as to constitute a nuisance, but it was apparently assumed, and not disputed by the defendants, that motor omnibuses, however well constructed, had a tendency to skid when the road was greasy. The defendants called no witnesses except as to quantum of damage. The case was left to the jury, who found a verdict for the plaintiff, but, subsequently, the county court judge, being of opinion that there was no evidence for the jury of liability on the part of the defendants, entered judgment for them :—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that, upon the above-mentioned facts, there was no evidence for the jury that the defendants' allowing the motor omnibus to run under the circumstances constituted a nuisance, and therefore the decision of the county court judge was correct.

By Buckley L.J. : Upon the facts there was evidence of negligence on the part of the defendants in allowing the motor omnibus to run under the circumstances.

Question, when the doctrine of "res ipsa loquitur" applies, discussed. WING *v.* LONDON GENERAL OMNIBUS COMPANY - **C. A. 652**

OMNIBUS, MOTOR—Negligence—Accident to passenger — Doctrine of "res ipsa loquitur" - - - - - - **652**
See NUISANCE.

OVERSEERS — Franchise — Old lodger list — Objection by overseers—Duty of overseers to appear - - - - - **169**
See PARLIAMENT. 1.

PARAPHERNALIA — Married woman — Judgment debt—Wearing apparel—Dresses purchased by wife—Money supplied by husband—Wife's separate estate - **831**
See HUSBAND AND WIFE. 2.

PARKS—Motor car—Exceeding speed limit—Parks regulations — Indorsement of licence - - - - - - **269**
See MOTOR CAR. 2.

PARLIAMENT—*Franchise—Old Lodger List—Objection by Overseers—Duty of Overseers to appear—Direction by Revising Barrister to Overseers—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 22; *s.* 28, *sub-ss.* 9, 10, 11.

Where a person whose name is on the existing register of voters in respect of lodgings sends in a claim to the overseers to be entered on the next register in respect of the same lodgings, and the overseers, acting under s. 22 of the Parliamentary and Municipal Registration Act, 1878, enter his name on the list of persons so claiming, and add in the margin opposite his name the words "objected to," the overseers must appear by themselves or by some person on their behalf before the revising barrister in support of their objection, otherwise the revising barrister must retain the name on the list. If the overseers so appear, then by s. 28, sub-ss. 10, 11, they are not required to give prima facie proof of the ground of objection, and, unless the person objected to appears by himself or by some one on his behalf and proves that he is entitled, the revising barrister must expunge his name.

By s. 22, if the overseers "have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered" they shall add in the margin of the list opposite his name the words "objected to," and such person shall be deemed to be duly objected to.

Semble, a direction by a revising barrister to the overseers that in his opinion as matter of law they have such reasonable cause in cases where the parties are parent and son or master and servant, and that they must object in such cases, does not relieve the overseers of the duty of satisfying themselves in each case that they have such reasonable cause before making an objection. CARTWRIGHT *v.* SHREWSBURY TOWN CLERK - - - - - - - **Div. Ct. 169**

2. —— *Franchise — Rating — Successive Occupation—Representation of the People Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *ss.* 27, 28, 30—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 26, 56, 59—*Poor Law Amendment Act*, 1868 (31 & 32 *Vict. c.* 122), *s.* 38.

The appellant, who was on the occupation list of voters, was the inhabitant occupier, during the whole of the qualifying period from July 15, 1907, to July 15, 1908, of two dwelling-houses in immediate succession. He occupied the first house until June, 1908, when he went into occupation of the second house. He was rated and paid all the rates due in respect of the first house, but, inasmuch as the building of the second house was not completed in April, 1908, when the rate for the half-year ending September 29, 1908, was made, the house was not entered in the rate-book, and no one was rated in respect thereof until after the termination of the qualifying period, and no claim to be rated in respect thereof nor tender or payment under s. 30 of the Representation of the People Act, 1832, of the sum which would have been due had he been rated was ever made by the appellant:—

Held by Buckley L.J. and Kennedy L.J. (Joyce J. doubting), that the appellant was not entitled to the franchise under ss. 3 and 26 of the Representation of the People Act, 1867.

Decision of Divisional Court, [1909] 1 K. B. 227, affirmed. PITTS *v.* MICHELMORE **C. A. 244**

—— Apartments, Tenement wholly let out in—Owner—Agent to collect rents—Rateability—Representation of the people
See RATES. **625**

PARLIAMENTARY PAPER—Printing extract from — Privilege — Libel—Communication published in newspaper — Fair comment - - - - - - **958**
See DEFAMATION. 3.

PARTRIDGE EGGS—Seizure and detention by police officer of—Justification under statute—Subsequent proceedings under different statute—Liability - - **415**
See GAME.

PASS-BOOK—Bank—Return of pass-book without objection—Settled account - **1010**
See BANKER.

PASSENGER — Accident to passenger — Motor omnibus — Negligence — Doctrine of "res ipsa loquitur" - - - **652**
See NUISANCE.

PASSENGERS — Ship—Contract of carriage—Passengers' luggage — Theft by shipowners' servants - - - - **987**
See SHIPPING. 4.

—— Tramway company — Common carrier of passengers — Liability for personal injuries—Negligence - - - **858**
See CARRIER.

PATENT — Receiver—Appointment—Equitable execution - - - - - - **903**
See RECEIVER.

PENAL SERVITUDE—Order that sentence for new offence run concurrently with, or commence after expiration of, remanet sentence—Jurisdiction of Court - **756**
See CRIMINAL LAW. 7.

PENSION — Attachment of debts — Garnishee order—Retired pay of officer in Army—Pension due but not paid—Bank crediting amount to customer - - **1029**
See ATTACHMENT.

PENSION—*continued.*
—— Police—Royal Irish Constabulary - **183**
See POLICE.

"**PERSON**"—Lottery—Offence—Corporation
See LOTTERY **93**

PISTOL — *Sale—Conditions—For use by Purchaser in his House—Reasonable Proof—Statement signed by Inspector of Police or Justice of the Peace—Pistols Act*, 1903 (3 *Edw.* 7, *c.* 18), *s.* 3.

On the sale of a pistol to a person who being a householder purposes to use such pistol only in his own house or the curtilage thereof it is necessary under s. 3 of the Pistols Act, 1903, not only that reasonable proof of these facts shall be given to the vendor, but also that the intending purchaser shall produce to the vendor a statement to that effect signed by himself and either by a police officer or a justice of the peace. MATTHEWS *v.* GRAY - - **Div. Ct. 89**

POACHING—Game.
See under GAME.

POLICE—*Pension—Service in more than One "Police Force"—Police Force with a Salary paid out of Money provided by Parliament"—Royal Irish Constabulary—Determination of Proportions in which Pension payable — Mandamus to Treasury—Servants of Crown—Police Act*, 1890 (53 & 54 *Vict. c.* 45), *ss.* 14, 33.

By s. 14 of the Police Act, 1890, "where a person has served in two or all of the following capacities—(i.) as a civil servant within the meaning of the Superannuation Act, 1887; (ii.) in a police force with a salary paid out of the police fund; (iii.) in a police force with a salary paid out of money provided by Parliament; he shall be entitled to reckon his entire period of service in both or all capacities for the purpose of pension . . . . Provided as follows . . . . (2.) The pension shall be payable from money provided by Parliament and from the police pension fund in such proportions as the Treasury may determine, regard being had to the period of service and the salary received in each capacity." By s. 33: "In this Act, unless the context otherwise requires . . . . the expression 'police force' means a force maintained by one of the police authorities mentioned in the" Third Schedule to the Act. By s. 40 the Act is not to extend to Scotland or Ireland.

A member of the Royal Irish Constabulary, which was a force with a salary paid out of money provided by Parliament, removed from that force with the written sanction of the chief officer thereof to the police force of a county in England. Upon his retirement from this latter force he became, under the Police Act, 1890, entitled to, and was granted by the police authority of the county, a pension calculated upon the number of years of his approved service in both forces. The police authority of the county applied to the Treasury, under s. 14 of the Act, to determine the proportions in which the pension should be payable from money provided by Parliament and from the county police pension fund, but the Treasury refused to do so upon the ground that the Royal Irish Constabulary was not a "police force" within the definition in s. 33, as it was not maintained by any of the police authorities mentioned in Sched. III., and that therefore s. 14 did not apply. Upon an application by the police authority for a mandamus:—

Held that, as the Royal Irish Constabulary was the only police force in which the salaries of the members were paid out of money provided by Parliament, the context required that the expression "police force" in s. 14, clause (iii.), should have its ordinary meaning, and not the limited meaning contained in the definition in s. 33, and that therefore it included the Royal Irish Constabulary, and s. 14 applied; and that a mandamus would lie to the Treasury to determine the proportions in which the pension was payable under s. 14. THE KING *v.* LORDS COMMISSIONERS OF HIS MAJESTY'S TREASURY **Div. Ct. 183**

—— False imprisonment—Railway company—Special constable—Arrest on suspicion of felony—Liability of company - **776**
See FALSE IMPRISONMENT.

—— Game—Seizure and detention by police officer of partridge eggs—Justification under statute—Subsequent proceedings under different statute—Liability **415**
See GAME.

POLICY—Life insurance.
See under INSURANCE (LIFE).

POOR LAW—Franchise—Rating—Successive occupation—Representation of the people - - - - - - **244**
See PARLIAMENT. 2.

PRACTICE — *Costs—Taxation—Appearance by Defendant in person—Subsequent Employment of a Solicitor—Failure to get Solicitor's Name placed on the Record—Irregularity.*

A defendant, who had appeared in an action in person, subsequently employed a solicitor to conduct his defence, but failed to give notice thereof at the Central Office, and consequently no solicitor appeared on the record as acting for the defendant. The plaintiff's solicitors were, however, aware that the defendant's solicitor was acting for the defendant, and had dealt with him as the defendant's solicitor in the action. The action being subsequently dismissed with costs for want of prosecution:—

Held that, though the failure to get the defendant's solicitor's name placed on the record was an irregularity, it ought not, under the circumstances, to be treated as fatal to the defendant's right to recover his solicitor's charges. MASON *v.* GRIGG - - **C. A. 341**

—— County Court.
See under COUNTY COURT.

—— Criminal law.
See under CRIMINAL LAW.

—— Receiver.
See under RECEIVER.

PRESUMPTION—Workmen's compensation—Seaman — Unexplained drowning — Evidence - - - - - - **46**
See EMPLOYER AND WORKMAN. 19.

PRINCIPAL — Liability of — Workmen's compensation — "The contractor" — Sub-contracting—"Workman"—Member of employer's family - - - **516**
See EMPLOYER AND WORKMAN. 15.

PRINCIPAL AND AGENT — *Shipbroker — Charterparty—Signature as Agent—Right to sue as Principal.*

By a contract in charterparty form, dated February 3, 1908, between the plaintiffs, who were shipbrokers, and the defendants, who were timber merchants, in which the plaintiffs were described as agents for owners of a steamship to be named later, and the defendants as charterers, it was agreed that the steamship should load at a foreign port about the latter half of June a cargo of timber from the agents of the charterers, and should deliver the same in London on being paid freight at a certain rate. The contract was signed by the plaintiffs "by authority of and as agents for owners." The plaintiffs were not in fact acting for principals, nor had they made a contract for a steamship to carry the cargo, but were themselves principals in the transaction. This was, however, not known to the defendants. On May 22 the plaintiffs entered into a charterparty with shipowners for the charter of a steamship to carry the cargo, the plaintiffs being described therein as agents for charterers, at a rate of freight less than that specified in the contract of February 3. The defendants' names were inserted by the plaintiffs in the charterparty as the charterers, and the charterparty was signed by the plaintiffs "as agents for merchants." In making the charter the plaintiffs were not in fact acting as agents for the defendants, but wer themselves principals. The cargo was shipped under bills of lading reserving freight at the rate specified in the charter of May 22, and was duly delivered at the port of discharge, and the bills of lading freight was paid. In an action by the plaintiffs to recover the difference between the freight so paid and that reserved by the contract of February 3, the defendants contended that, as the plaintiffs had made that contract as agents, they were not entitled to sue upon it as principals:—

Held, that as the plaintiffs in making the contract of February 3 had in fact no principals, but were themselves the principals, they were entitled to sue upon it and to recover the freight reserved thereby. HARPER & Co. *v.* VIGERS BROTHERS - - - - **Pickford J. 549**

—— Buildings — Persons altering drains — By-laws—Liability of agents carrying out work - - - - - - **265**
See LONDON. 3.

PRIVIES—Undertaking by local authority to cleanse—Neglect of duty—Reasonable excuse - - - - - **511**
See LOCAL GOVERNMENT. 2.

PRIVILEGE — Crown, Privilege of — Action between subjects involving rights of the Crown—Right of Crown to transfer action to Revenue side - - **1**
See CROWN.

—— Libel—Absolute privilege—Official receiver in companies' liquidation — General annual report of Board of Trade **306**
See DEFAMATION. 1.

—— Libel — Parliamentary paper — Printing extract from—Newspaper—Fair comment - - - - - - - **958**
See DEFAMATION. 3.

PROMISSORY NOTE—Joint and several promissory note signed by husband and wife for debt of third party—Liability of wife - - - - - - **390**
See HUSBAND AND WIFE. 1.

PROOF — Onus of — Accident — Evidence — Inference—Workmen's compensation **41**
See EMPLOYER AND WORKMAN. 10.

—— Onus of — Lost acknowledgment — Parol evidence—Specialty debt—Bond - **724**
See LIMITATIONS.

—— Proposal for a scheme—Debtor's application to expunge a proof dismissed—Adjudication - - - - - **788**
See BANKRUPTCY. 1.

—— Receiving order—Proposal for a composition rejected by the creditors—Debtor's application to expunge a proof—Locus standi of debtor—Costs - - **784**
See BANKRUPTCY. 5.

PUBLIC HEALTH — Building — Conversion of building into dwelling-house — "New building"—Breach of by-law - **257**
See LOCAL GOVERNMENT. 1.

—— Privies—Undertaking by local authority to cleanse—Neglect of duty—Reasonable excuse - - - - - - **511**
See LOCAL GOVERNMENT. 2.

PUBLIC HEALTH (LONDON) — Lodging-house — Cleansing — Duty on "landlord" — Validity of by-law - - - **127**
See LONDON. 4.

—— Removal of refuse—Restaurant—House or trade refuse - - - - - - **588**
See LONDON. 5.

PUBLIC HOSPITAL.
See under HOSPITAL.

PUBLICATION—Libel in newspaper—Intention to defame plaintiff - - - - **444**
See DEFAMATION. 2.

QUITTANCES — Copyholds — Compensation — Delay in enfranchisement—Interest
See LANDS CLAUSES ACTS. **374**

RAILWAY—*Arbitration—Jurisdiction of Railway and Canal Commission—Differences between*

RAILWAY—*continued.*

Railway Companies—Agreement confirmed or authorized by General or Special Act—Regulation of Railways Act, 1873 (36 & 37 *Vict. c.* 48), *s.* 8—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 15—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 87.

In order that an agreement between railway companies may be "confirmed or authorized" by a general or special Act within the meaning of s. 15 of the Railway and Canal Traffic Act, 1888, it is not necessary that the agreement should be specifically confirmed or authorized by statute.

By s. 30 of the Barry Dock and Railways Act, 1891, running powers over a branch line belonging to the Great Western Railway Company were conferred upon the Barry Railway Company, and by s. 34 of the same Act it was provided that "the terms conditions and regulations on and subject to which the company" [the Barry Railway Company] "shall be entitled to run over and use any part of the Great Western Railway under the powers of this Act and the stations and works connected therewith and the tolls or other consideration to be paid in respect of the same shall if not agreed upon between the company and the Great Western Railway Company be from time to time determined in manner provided by the Regulation of Railways Act 1873 as amended by the Railway and Canal Traffic Act 1888 with respect to differences between railway companies."

In pursuance of the powers conferred upon the companies by the above-mentioned Act and by the provisions of the Railways Clauses Consolidation Act, 1845, s. 87, an agreement was made between the companies in relation to the user by the Barry Railway Company of the aforesaid branch line of the Great Western Railway Company. By a clause in this agreement it was provided that all questions and differences arising thereunder should be determined by arbitration in manner provided by the Railway Companies Arbitration Act, 1859, or any subsisting statutory modification thereof. Differences having arisen under the agreement, the Great Western Railway Company applied to the Railway Commissioners under s. 8 of the Regulation of Railways Act, 1873, and s. 15 of the Railway and Canal Traffic Act, 1888, to decide those differences:—

Held by Vaughan Williams L.J. and Fletcher Moulton L.J. (Buckley L.J. dissenting), that, although the provisions of the agreement had not been confirmed or specifically authorized by statute, they came within the terms "provisions of any agreement confirmed or authorized by any such Act" in s. 15 of the Railway and Canal Traffic Act, 1888, and therefore the Railway Commissioners had jurisdiction under s. 8 of the Regulation of Railways Act, 1873, to determine the before-mentioned differences.

By Buckley L.J.: Inasmuch as the provision for arbitration in the agreement was not confirmed or authorized by statute, the case did not fall within s. 15 of the Railway and Canal Traffic Act, 1888. GREAT WESTERN RAILWAY COMPANY *v.* BARRY RAILWAY COMPANY.
C. A. 670

RAILWAY—*continued.*

2. —— *Level Crossing — Highway — Road raised to Level of Railway — Approaches to Crossing—Repair of Roadway of Approaches.*

A railway company, being authorized to carry their railway across a high road on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined "approaches" on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the company to repair the roadway upon the approaches:—

Held, that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the high road, an obligation to keep in repair the roadway upon the whole of the approaches, including those portions which lay outside the fences of the railway.

Judgment of Jelf J., [1909] 1 K. B. 368, affirmed. HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY COMPANY
C. A. 403

—— Special constable—Arrest on suspicion of felony—Liability of company - **776**
See FALSE IMPRISONMENT.

RATES—*Tenement wholly let out in Apartments—Owner—Agent to collect Rents—Rateability—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 7.

An agent who is employed by the owner of a dwelling-house, situate in a parliamentary borough, and wholly let out in apartments, to collect the rents on his behalf is not liable to be rated as owner under s. 7 of the Representation of the People Act, 1867. NOKES *v.* STRONG
Div. Ct. 625

RECEIVER — *Appointment — Practice — Execution—Patent—Equitable Execution—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The defendant, against whom the plaintiffs had recovered judgment in an action, which remained unsatisfied, was resident abroad, and had no property within the jurisdiction available for the purpose of a fieri facias, or other ordinary process of execution. He was the registered owner of three English patents, but it was not shewn that he was in receipt of any profits therefrom by way of royalties or otherwise. On an application for the appointment of a receiver, by way of execution, of all rents, profits, and moneys receivable in respect of the defendant's interest in the patents:—

Held by Vaughan Williams L.J. and Buckley L.J. (Fletcher Moulton L.J. dissenting), that an order for appointment of a receiver could not in such a case be made.

Holmes v. *Millage*, [1893] 1 Q. B. 551, followed. EDWARDS & Co. *v.* PICARD
C. A. 903

—— Bankruptcy—Transfer of assets to official receiver - - - - - - **841**
See BANKRUPTCY. 4.

RECEIVING ORDER—In lieu of committal—Costs in Divorce Court—Order to pay—Default—Judgment summons - 430
See BANKRUPTCY. 2.

—— Proposal for a composition rejected by the creditors — Debtor's application to expunge a proof — Locus standi of debtor—Costs - - - - - 784
See BANKRUPTCY. 5.

REFUSE—Removal of —Restaurant—House or trade refuse - - - - - - 588
See LONDON. 5.

REGISTRAR—County court — Appeal to judge from registrar—Interlocutory application—Order - - - - - 30
See COUNTY COURT. 1.

REGISTRATION — Workmen's compensation — Agreement - - - - 631, 640
See EMPLOYER AND WORKMAN. 6, 7.

REHEARING—Evidence on — Practice—Abortive trial — Rehearing — Evidence on former hearing - - - - - 14
See CRIMINAL LAW. 8.

REMANET SENTENCE — Penal servitude — Order that sentence for new offence run concurrently with, or commence after expiration of, remanet sentence—Jurisdiction of Court - - - - - 756
See CRIMINAL LAW. 7.

REMOTENESS—Workmen's compensation—Surgical operation - - - - - 51
See EMPLOYER AND WORKMAN. 21.

REMOVAL—Of refuse—Restaurant—House or trade refuse - - - - - - 588
See LONDON. 5.

RENT—Distress for — Rent due on Sunday—Legality of distress levied on following Monday - - - - - - 753
See LANDLORD AND TENANT. 2.

REPAIR — Highway — Extraordinary traffic — Timber haulage - - - - 845
See HIGHWAY.

—— Lease—Mortgagor in possession—Breach of covenant to repair—Right of mortgagor to sue lessee - - - - - - 484
See LANDLORD AND TENANT. 5.

—— Railway company—Level crossing—Repair of roadway of approaches - - 403
See RAILWAY. 2.

REPRESENTATION OF THE PEOPLE—Parliament.
See under PARLIAMENT.

—— Tenement wholly let out in apartments—Owner—Agent to collect rents—Rateability - - - - - - - 625
See RATES.

RESTAURANT—Removal of refuse—House or trade refuse - - - - - - 588
See LONDON. 5.

RESTRAINT OF TRADE — Infant — Severable stipulations — Contract for benefit of infant—Injunction - - - - 235
See MASTER AND SERVANT. 2.

REVENUE — *Dog Licence — Exemption — Dogs for tending Sheep and Cattle—Consent of Petty Sessional Court—Jurisdiction to inquire whether more than One Dog necessary—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 22, *sub-s.* 2—*Dogs Act*, 1906 (6 *Edw.* 7, *c.* 32), *s.* 5, *sub-s.* 1.

By s. 22, sub-s. 2, of the Customs and Inland Revenue Act, 1878, a farmer or shepherd may fill up and sign a declaration in the prescribed form stating the number of dogs kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd, and upon delivering the declaration so filled up and signed to the proper person he shall be entitled to receive a certificate of exemption from duty in respect of the dog or dogs, not exceeding two in number, kept by him solely for use as above mentioned. By s. 5, sub-s. 1, of the Dogs Act, 1906, the grant under s. 22 of the above Act of a certificate of exemption from duty in respect of a dog shall require the previous consent of a petty sessional Court, but such consent shall not be withheld if the Court is of opinion that the conditions for exemption mentioned in the said section apply in the case of the applicant.

A farmer claimed exemption from duty in respect of two dogs which were kept by him solely for use in tending sheep and cattle, one being specially trained to tend sheep, and the other to tend cattle. The justices in petty sessions found that only one dog was necessary for the applicant, and refused their consent to the grant of a certificate of exemption for more than one dog :—

Held, that the justices had only jurisdiction under s. 5, sub-s. 1, of the Dogs Act, 1906, to inquire whether the conditions specified in s. 22 of the Act of 1878 applied, namely, whether the applicant was a farmer or shepherd, and whether the dogs in respect of which exemption was claimed were kept by him solely for use in tending sheep or cattle or in the exercise of the calling or occupation of a shepherd, and as those conditions were fulfilled the justices had no power to refuse their consent to exemption for two dogs because they were of opinion that, in the circumstances, only one dog was necessary.
JOHNSON *v.* WILSON - - **Div. Ct. 497**

2. —— *Dog Licences — Inland Revenue — Crown—Duties in respect of Dogs—Penalty for keeping Dog without Licence—Information dismissed—Order to pay Costs—Costs paid to Clerk to Justices—Debt due to Crown — Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *ss.* 18, 31—*Dog Licences Act*, 1867 (30 & 31 *Vict. c.* 5), *ss.* 4, 8—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *s.* 33, *sub-s.* 2.

On informations laid by an officer of Inland Revenue under s. 8 of the Dog Licences Act, 1867, against three defendants respectively for

REVENUE—*continued.*
keeping a dog without a licence the justices dismissed the informations and ordered the defendants to pay certain sums as costs under s. 16 of the Summary Jurisdiction Act, 1879. The defendants paid the costs to the clerk to the justices.

On an information filed by the Attorney-General claiming from the clerk to the justices as a debt due to the Crown the residue of the sums so received by him after deducting the amount of certain fees authorized to be taken by him by an authorized table of fees and allowances :—

Held, that the Crown was entitled to recover. ATTORNEY-GENERAL *v.* CLARK **Channell J. 7**

3. —— *Income Tax—Deductions—Profits of Brewery—Tied Licensed Houses—Compensation Charge—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1 ; *Sched. D.*

A company which carried on the trade of brewers were, solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof, the owners of licensed houses which they let to tenants who covenanted to buy all their beers from the company. By means of these houses, which were substantially part of the plant or outfit necessary to carry on the business profitably, the company were enabled to earn increased profits, upon which they paid income tax. The company were compelled under s. 3 of the Licensing Act, 1904, to allow to the tenants of the licensed houses certain deductions from rent in respect of the company's share of the annual compensation charge imposed on the licensed houses, and the company claimed that, in arriving at the amount of the profits of their trade as brewers assessable to income tax, a deduction ought to be allowed in respect of the sum which they were compelled to pay for the compensation charge, as being an expense incurred in carrying on that trade :—

Held by Cozens-Hardy M.R. and Farwell L.J. (Kennedy L.J. dissenting) that, on the facts as found by the Commissioners for the General Purposes of the Income Tax Acts, the sum which the company were compelled to pay for the compensation charge was a payment necessary to enable them to earn profits as a brewery company and might properly be deducted from the profits with a view to ascertaining the balance on which income tax had to be paid.

Decision of Channell J., [1909] 1 K. B. 711, reversed. SMITH (SURVEYOR OF TAXES) *v.* LION BREWERY COMPANY, LIMITED **C. A. 912**

4. —— *Stamp—Agreement for Sale of Goods—Price to be paid by Instalments at stated Periods—Bond, Covenant, or Instrument of any kind whatsoever—Liability to ad valorem Stamp Duty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing, not under seal, between the company and a customer, the company agreed to supply to the customer for a period of seven years electric energy for motive power, heating, and lighting purposes on the customer's premises at a fixed charge of 57*l.* 10*s.*

REVENUE—*continued.*
per quarter and an additional penny per unit as indicated by meter :—

Held, that the agreement was chargeable with an ad valorem duty of 2*s.* 6*d.* per cent. on the aggregate amount of the minimum quarterly payments for seven years as being a "security" for sums of money at stated periods, under clause 1 of the heading "Bond, Covenant, or Instrument of any kind whatsoever" in Sched. I. to the Stamp Act, 1891.

Decision of Channell J., [1909] 1 K. B. 737, affirmed. COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY *v.* INLAND REVENUE COMMISSIONERS - - **C. A. 604**

REVIEW — Workmen's compensation — Agreement—Registration—Review of weekly payment - - - - - **631, 640**
See EMPLOYER AND WORKMAN. 6, 7.

RULES OF SUPREME COURT, Order XXXVI. (Trial), r. 37 - - - - - **958**
See DEFAMATION. 3.

SALE—Bread.
See under BREAD.

—— Pistol—Conditions - - - - - **89**
See PISTOL.

SALE OF GOODS — Agreement for — Stamp—Price to be paid by instalments at stated periods—Liability to ad valorem stamp duty - - - - - - **604**
See REVENUE. 4.

SAVAGE ANIMAL — *Scienter — Liability of Owner to Trespassers.*

The defendant put into his field a horse which to his knowledge would bite human beings. Members of the public had for many years to the defendant's knowledge habitually trespassed on the field. The plaintiff while so trespassing was bitten by the horse :—

Held, that the fact of the defendant's knowledge that the public habitually trespassed there imposed no duty upon him to take any care for their protection, and that he was not liable to the plaintiff for the injuries sustained. LOWERY *v.* WALKER - - - - - - **Div. Ct. 433**

SCHOOLS — Corporation — County council — Liability for negligence—Obligation to maintain school premises—Injury to pupil caused by defect in asphalte of playground - - - - - - **762**
See NEGLIGENCE.

—— London—Building notice—Local education authority — Obligation to serve notice - - - - - - - **138**
See LONDON. 1.

—— Public elementary school — Teachers — Salaries — Provided and non-provided schools—Local education authority — Right to discriminate — Failure to maintain and keep efficient - - **1045**
See EDUCATION.

SCIENTER—Savage animal—Liability of owner to trespassers - - - - - **433**
See SAVAGE ANIMAL.

SEAMAN—Compensation - - - - - **811**
See MASTER AND SERVANT. 1.

—— Workmen's compensation - - **36, 46**
529, 704
See EMPLOYER AND WORKMAN. 13, 18—20.

SEPARATION ORDER—Order for maintenance of wife—Non-payment by husband—Absence of evidence of means—Committal to prison - - - - - **851**
See SUMMARY JURISDICTION.

SERVANT—Master and.
See under EMPLOYER AND WORKMAN. MASTER AND SERVANT.

SERVICE—Mayor's Court—Practice—Notice of appeal—Service on Sunday - - **100**
See MAYOR'S COURT.

SET-OFF — Judgment summons by married woman—Judgment debtor a creditor—Costs in bankruptcy - - - **622**
See BANKRUPTCY. 3.

SEWERS—London—Buildings—Persons altering drains—By-laws—Liability of agents carrying out work - - - **265**
See LONDON. 3.

SHINGLE — Justices — Jurisdiction — Ouster—Bona fide claim of right—Foreshore—Removal of shingle—Owner - **564**
See JUSTICES. 1.

SHIPBROKER — Charterparty — Signature as agent—Right to sue as principal - **549**
See PRINCIPAL AND AGENT.

SHIPPING—*Charterparty—Excepted Perils—Deviation—Damage to Cargo—Liability of Shipowner.*

The plaintiffs chartered the defendants' ship to carry a cargo of superphosphates in bags for delivery at Algeciras and Alicante, with leave to call at Corunna. The vessel was delayed at Corunna and Algeciras. On leaving Algeciras she deviated from the chartered voyage by going to Seville, whence she went to Alicante. By reason of the various delays the cargo delivered at Alicante was damaged, the damage being due to the action of sulphuric acid in the superphosphates eating away the bags :—

Held, that the deviation to Seville put an end to the charterparty as from the beginning of the voyage, and that the defendants were therefore, as to the whole voyage, under the obligations of common carriers; that as regards damage to the cargo by the delay at Corunna and Algeciras the defendants were not liable, the damage being due to the nature of the cargo, and not to any failure on the part of the defendants to carry the goods with reasonable despatch; but that as regards the increased damage due to the delay occasioned by the deviation itself the defendants were liable under the obligations of common carriers.

Joseph Thorley, Ld. v. *Orchis Steamship Co.*, [1907] 1 K. B. 660, considered and applied. INTERNATIONALE GUANO EN SUPERPHOSPHAATWERKEN *v.* ROBERT MACANDREW & CO. **Pickford J. 360**

2.—— *Charterparty — Lien — Demurrage payable Day by Day—"Charges."*

A charterparty provided that the charterer should be allowed so many running days for loading and that the discharge should be effected according to the custom of the port; that, in the event of the detention of the vessel by the charterer beyond the laying days, demurrage should be paid at a specified rate "day by day as falling due"; and that the owner should have a lien for "all freight, demurrage, and all other charges whatsoever."

In an action by the shipowner against an indorsee of the bills of lading, which incorporated the provisions of the charterparty, to determine the extent of the lien :—

Held, that the fact that demurrage was payable day by day as falling due did not deprive the shipowner of his lien, and that the lien applied to demurrage at the port of loading.

Gardner v. *Trechmann*, (1884) 15 Q. B. D. 154, and *Pederson* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267, distinguished.

Held, further, that as against a bill of lading holder the word "charges" did not include charges not specifically mentioned in the charterparty.

Decision of Bray J., [1909] 1 K. B. 948, affirmed. REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB - - - - **C. A. 998**

3. —— *Charterparty—"Ready for loading"—Discharge of previous Cargo—Cancellation.*

By a charterparty of November 15, 1907, it was agreed between the plaintiffs and the defendants that the ship *Lyderhorn* should proceed to load at Iquique and Caleta Buena and there receive from the agents of the defendants a full cargo of nitrate of soda. Twenty-five lay days were to be allowed to the merchants for loading the ship and for waiting orders abroad; lay days to be reckoned from the day after the master should give notice to charterer's agents of being ready to receive cargo and not to commence before January 1, 1908, at the respective ports, and to cease when they should give him notice that he was at liberty to proceed to sea. Stiffening of nitrate to be supplied as required at Iquique, but not before December 10, on receipt of forty-eight hours' notice from captain of his readiness to receive the same. Time occupied in discharging ballast or in shifting ports not to count as lay days. Demurrage was provided for. Freight was payable at 16*s.* a ton. "Should the vessel not have arrived at her loading port and be ready for loading (in accordance with this charter) on or before noon of January 31, 1908, charterers to have the option of cancelling this charter." At the date of the charterparty the *Lyderhorn* was at Caleta Buena discharging a cargo of coal

SHIPPING—*continued.*
and intended to complete her discharge at Iquique. She arrived at Iquique on December 13, and by January 27, 1908, had discharged as much of her cargo of coal as could safely be unladen without some stiffening. The captain thereupon gave notice to the defendants' agents that he required 700 tons of nitrate for stiffening, but they refused to supply it unless he would agree to redeliver it if the charterparty were cancelled. It was admitted that the whole of the coal could not have been discharged by noon of January 31, 1908. The defendants cancelled the charterparty, and the shipowners brought this action to decide whether they were entitled to do so, and for damages :—

Held by Lord Alverstone C.J. and by the Court of Appeal, that the vessel was not ready for loading within the meaning of the charterparty, and that the defendants were entitled to cancel it. SAILING SHIP "LYDERHORN" COMPANY *v.* DUNCAN FOX & CO - **C. A. 929**

4. —— *Contract of Carriage—Passengers' Luggage—Exception of "loss by whatsoever cause or in whatever manner occasioned"—Theft by Shipowners' Servants—Condition.*

Passengers' luggage was carried on board the defendants' ship on the terms of a ticket containing a condition that the defendants should not be responsible "for any loss, damage, injury . . . . of or to passengers or their baggage or effects . . . . by whatsoever cause or in whatever manner . . . . occasioned, and whether arising from the act of God, King's enemies, ... thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act neglect or default whatsoever of the pilot master mariners or other servants of the steamer" :—

Held, that the condition protected the defendants from liability to make good a loss occasioned by the felonious act of their servants. MARRIOTT *v.* YEOWARD BROTHERS.
Pickford J. 987

5. —— *Crew, Agreement with—Stipulations contrary to Law—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 114.

Stipulations in an agreement between the master of a ship and the crew which are inconsistent with any of the provisions of the Merchant Shipping Act, 1894 (as for instance where the agreement provides that for absence by a seaman from his ship without leave deductions shall be made from his wages differing in amount, and enforceable in a different manner, from the deductions provided by the Act), are "contrary to law" within the meaning of s. 114 of that Act, and are therefore not permissible. MERCANTILE STEAMSHIP COMPANY *v.* HALL.
Pickford J. 423

—— Charterparty — Shipbroker — Signature as agent—Right to sue as principal - **549**
See PRINCIPAL AND AGENT.

—— Seaman—Compensation - - - **811**
See MASTER AND SERVANT. 1.

SHIPPING—*continued.*
—— Seaman—Employer and workman **36, 46, 529, 704**
See EMPLOYER AND WORKMAN. 13, 18—20

SIGNATURE — Shipbroker — Charterparty — Signature as agent—Right to sue as principal - - - - - - **549**
See PRINCIPAL AND AGENT.

SOLICITOR—Costs—Taxation—Appearance by defendant in person—Subsequent employment of a solicitor—Irregularity
See PRACTICE. **341**

SPECIALTY DEBT—Bond—Lost acknowledgment—Parol evidence—Onus of proof
See LIMITATIONS. **724**

STAMP—Sale of goods, Agreement for—Price to be paid by instalments at stated periods—Liability to ad valorem stamp duty
See REVENUE. 4. **604**

STATUTES :—

1677.

29 Car. 2, c. 7, s. 6—*Sunday Observance* - **100**
See MAYOR'S COURT.

1800.

39 & 40 Geo. 3, c. 94, s. 2—*Criminal Lunatics* - - - - - **81**
See CRIMINAL LAW. 6.

1814.

54 Geo. 3, c. 159, ss. 14, 28—*Harbours* - **564**
See JUSTICES. 1.

1823.

4 Geo. 4, c. 60, ss. 41, 67—*Lotteries* - **93**
See LOTTERY.

1831.

1 & 2 Will. 4, c. 32, s. 24—*Game* - - **415**
See GAME.

1832.

2 & 3 Will. 4, c. 45, ss. 27, 28, 30—*Representation of the People* - - - **244**
See PARLIAMENT. 2.

1833.

3 & 4 Will. 4, c. 42, ss. 3, 5—*Civil Procedure* - - - - - - **724**
See LIMITATIONS.

1836.

6 & 7 Will. 4, c. 37, s. 4—*Bread* - - **610**
See BREAD.

1840.

3 & 4 Vict. c. 9, s. 3—*Parliamentary Papers* - - - - - **958**
See DEFAMATION. 3.

1842.

5 & 6 Vict. c. 35, s. 100, cases 1 and 2, r. 1 ; Sched. D—*Income Tax* - **912**
See REVENUE. 3.

STATUTES—*continued.*

1845.

8 & 9 Vict. c. 18, ss. 95, 96, 97—*Lands Clauses Consolidation* - - - **374**
See LANDS CLAUSES ACTS.

8 & 9 Vict. c. 20, s. 87—*Railways Clauses Consolidation* - - - - - **670**
See RAILWAY. 1.

1848.

11 & 12 Vict. c. 43—*Summary Jurisdiction* - - - - - - **614**
See JUSTICES. 2.

—— —— ss. 18, 31 - - - - - **7**
See REVENUE. 2.

1849.

12 & 13 Vict. c. 92, s. 2—*Cruelty to Animals* - - - - - - **748**
See CRIMINAL LAW. 2.

1854.

17 & 18 Vict. c. 104, s. 2—*Merchant Shipping* - - - - - - **36**
See EMPLOYER AND WORKMAN. 20.

1857.

20 & 21 Vict. c. clvii., s. 8—*Mayor's Court of London Procedure* - - **100**
See MAYOR'S COURT.

1862.

25 & 26 Vict. c. 102—*Metropolis Management*, s. 75 (repealed) - - - - **317**
See LONDON. 2.

25 & 26 Vict. c. 114, ss. 1, 2—*Poaching Prevention* - - - - - - **415**
See GAME.

1864.

27 & 28 Vict. c. 47, s. 9—*Penal Servitude* **756**
See CRIMINAL LAW. 7.

1867.

30 & 31 Vict. c. 5, ss. 4, 8—*Dog Licences* **7**
See REVENUE. 2.

30 & 31 Vict. c. 102, ss. 3, 26, 56, 59—*Representation of the People* - **244**
See PARLIAMENT. 2.

—— —— s. 7 - - - - - - **625**
See RATES.

1868.

31 & 32 Vict. c. 122, s. 38—*Poor Law Amendment* - - - - - **244**
See PARLIAMENT. 2.

1869.

32 & 33 Vict. c. 62, s. 5—*Debtors* - **430, 622**
See BANKRUPTCY. 2, 3.

32 & 33 Vict. c. 71, s. 125—*Bankruptcy* - **841**
See BANKRUPTCY. 4.

STATUTES—*continued.*

1870.

33 & 34 Vict. c. 75—*Elementary Education* - - - - - - - **762**
See NEGLIGENCE.

33 & 34 Vict. c. 78, s. 32, sub-ss. 2, 5—*Tramways* - - - - - - **297**
See TRAMWAY.

1872.

35 & 36 Vict. c. 94, s. 49—*Licensing* - **104**
See LICENSING ACTS. 3.

1873.

36 & 37 Vict. c. 48, s. 8—*Regulation of Railways* - - - - - - **670**
See RAILWAY. 1.

36 & 37 Vict. c. 66, s. 25, sub-s. 5—*Judicature*
See LANDLORD AND TENANT. 5. **484**

—— —— s. 25, sub-s. 8 - - - - **903**
See RECEIVER.

1874.

37 & 38 Vict. c. 49, s. 3—*Licensing* - **104**
See LICENSING ACTS. 3.

1875.

38 & 39 Vict. c. 24, s. 1—*Falsification of Accounts* - - - - - - **980**
See CRIMINAL LAW. 5.

38 & 39 Vict. c. 55, ss. 42, 43—*Public Health*
See LOCAL GOVERNMENT. 2. **511**

—— —— ss. 157, 159 - - - - **257**
See LOCAL GOVERNMENT. 1.

38 & 39 Vict. c. 90, s. 13—*Employers and Workmen* - - - - - - **811**
See MASTER AND SERVANT. 1.

—— —— s. 13 - - - - - - **36**
See EMPLOYER AND WORKMAN. 20.

1878.

41 & 42 Vict. c. 15, s. 22, sub-s. 2—*Customs and Inland Revenue* - - - **497**
See REVENUE. 1.

41 & 42 Vict. c. 26, s. 22; s. 28, sub-ss. 9, 10, 11—*Parliamentary and Municipal Registration* - - - - - **169**
See PARLIAMENT. 1.

41 & 42 Vict. c. 31, s. 10, sub-s. 3—*Bills of Sale* - - - - - - - **437**
See BILL OF SALE.

41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives (Amendment)* - - **845**
See HIGHWAY

1879.

42 & 43 Vict. c. 49, s. 16—*Summary Jurisdiction* - - - - - - **7**
See REVENUE. 2.

STATUTES—*continued.*

1880.

43 & 44 Vict. c. 42, s. 8—*Employers' Liability* **36, 811**
See MASTER AND SERVANT. 1, 20.

1881.

44 & 45 Vict. c. 41, s. 10—*Conveyancing and Law of Property* - - - - **484**
See LANDLORD AND TENANT. 5.

—— —— s. 14 - - - - - - **894**
See LANDLORD AND TENANT. 3.

44 & 45 Vict. c. 58, s. 141—*Army* - - **1029**
See ATTACHMENT.

1882.

45 & 46 Vict. c. 43, ss. 8, 9—*Bills of Sale* (1878) *Amendment* - - - **437**
See BILL OF SALE.

45 & 46 Vict. c. 75—*Married Women's Property* **831**
See HUSBAND AND WIFE. 2.

1883.

46 & 47 Vict. c. 52, s. 103, sub-s. 5—*Bankruptcy* - - - - - - **430**
See BANKRUPTCY. 2.

—— —— s. 105; Sched. II., r. 25 - - **788**
See BANKRUPTCY. 1.

—— —— ss. 159, 160, 161 - - - **841**
See BANKRUPTCY. 4.

—— —— Sched. II., r. 25 - - - **784**
See BANKRUPTCY. 5.

1887.

50 & 51 Vict. c. 58, s. 49, r. 12—*Coal Mines Regulation* - - - - - - **146**
See MINES.

50 & 51 Vict. c. 66, s. 3, sub-s. 1—*Bankruptcy* (*Discharge and Closure*) - **841**
See BANKRUPTCY. 4.

1888.

51 & 52 Vict. c. 25, s. 15—*Railway and Canal Traffic* - - - - - - - **670**
See RAILWAY. 1.

51 & 52 Vict. c. 43, s. 93—*County Courts* **573**
See COUNTY COURT. 3.

—— —— s. 156 - - - - - - **384**
See COUNTY COURT. 2.

1889.

52 & 53 Vict. c. 63, s. 2, sub-s. 1—*Interpretation* **93**
See LOTTERY.

1890.

53 Vict. c. 5, ss. 13, 299—*Lunacy* - - **504**
See LUNACY.

53 & 54 Vict. c. 21, s. 33, sub-s. 2—*Inland Revenue Regulation* - - - **7**
See REVENUE. 2.

STATUTES—*continued.*

53 & 54 Vict. c. 45, ss. 14, 33—*Police* - **183**
See POLICE.

53 & 54 Vict. c. 63, ss. 8, 27, 29; Sched. I., s. 3—*Companies* (*Winding-up*) - - **306**
See DEFAMATION. 1.

53 & 54 Vict. c. 71, s. 3—*Bankruptcy* - **784**
See BANKRUPTCY. 5.

1891.

54 & 55 Vict. c. 39, Sched. I.—*Stamp* - **604**
See REVENUE. 4.

54 & 55 Vict. c. 65, s. 3—*Lunacy* - - **504**
See LUNACY.

54 & 55 Vict. c. 69, s. 3, sub-s. 3—*Penal Servitude* - - - - - - **756**
See CRIMINAL LAW. 7.

54 & 55 Vict. c. 76, ss. 30, 33, 141—*Public Health—London* - - - - - **588**
See LONDON. 5.

—— —— s. 94, sub-s. 1 (*e*); s. 116 - **127**
See LONDON. 4.

1894.

57 & 58 Vict. c. 60, s. 114—*Shipping* - **423**
See SHIPPING. 5.

—— —— s. 742 - - - - - - **36**
See EMPLOYER AND WORKMAN. 20.

57 & 58 Vict. c. ccxiii., ss. 22, 27, 216—*London Building* - - - - - - **317**
See LONDON. 2.

—— —— ss. 145, 201 - - - - **138**
See LONDON. 1.

1895.

58 & 59 Vict. c. 39, ss. 5, 9—*Summary Jurisdiction* (*Married Women*) - - **851**
See SUMMARY JURISDICTION.

1896.

59 & 60 Vict. c. 36, s. 6—*Locomotives on Highways* - - - - - - - **599**
See MOTOR CAR. 1.

59 & 60 Vict. c. 43, s. 6—*Coal Mines Regulation* **146**
See MINES.

1897.

60 & 61 Vict. c. 37, s. 3—*Workmen's Compensation* - - - - - - - **274**
See EMPLOYER AND WORKMAN. 9.

—— —— Sched. I., par. 12; Sched. II., par. 8 - - - - - - - **631**
See EMPLOYER AND WORKMAN. 7.

1898.

61 & 62 Vict. c. 29, s. 12—*Locomotives* - **845**
See HIGHWAY.

61 & 62 Vict. c. 36, s. 1 (*f*) (i.)—*Criminal Evidence* - - - - - **945**
See CRIMINAL LAW. 4.

STATUTES—*continued.*

1899.

62 & 63 Vict. c. 33—*Board of Education* 762
See NEGLIGENCE.

1900.

63 & 64 Vict. c. 51, s. 2, sub-s. 1 (*b*)—*Money-lenders* - - - - - - 353
See MONEY-LENDER.

1902.

2 Edw. 7, c. 42—*Education* - - - 762
See NEGLIGENCE.

—— —— s. 7 - - - - - - 1045
See EDUCATION.

1903.

3 Edw. 7, c. 18, s. 3—*Pistols* - - - 89
See PISTOL.

3 Edw. 7, c. 36, s. 4—*Motor Car* - - 269
See MOTOR CAR. 2.

—— —— s. 7 - - - - - - 599
See MOTOR CAR. 1.

1904.

4 Edw. 7, c. 23, ss. 1, 2—*Licensing* - 112
See LICENSING ACTS. 2.

—— —— s. 2, sub-s. 1 - - - - 740
See LANDLORD AND TENANT. 4.

—— —— s. 3 - - - - - - 912
See REVENUE. 3.

—— —— s. 3, sub-s. 3; Sched. II. - 884
See LICENSING ACTS. 1.

1906.

6 Edw. 7, c. 32, s. 5, sub-s. 1—*Dogs* - 497
See REVENUE. 1.

6 Edw. 7, c. 58—*Workmen's Compensation* 61
See EMPLOYER AND WORKMAN. 1.

—— —— s. 1 - - - **46, 51, 54, 539**
See EMPLOYER AND WORKMAN. 5, 19, 21, 22.

—— —— s. 1, sub-s. 1 - **41, 635, 798, 804**
See EMPLOYER AND WORKMAN. 2, 3, 4, 10.

—— —— ss. 1, 13; Sched. I. (1.) (*a*) (ii.) 521
See EMPLOYER AND WORKMAN. 8.

—— —— s. 1; Sched. 1., par. 1 (*b*) - 533
See EMPLOYER AND WORKMAN. 12.

—— —— s. 4, sub-ss. 1, 2, 3; s. 13 - 516
See EMPLOYER AND WORKMAN. 15.

—— —— s. 7, sub-s. 1 (*e*); Sched. I., par. 3 704
See EMPLOYER AND WORKMAN. 13.

—— —— ss. 7, 8; Sched. III. - - 529
See EMPLOYER AND WORKMAN. 18.

STATUTES—*continued.*

6 Edw. 7, c. 58—*Workmen's Compensation*, s. 15; Sched. II. (4.) - - - 274
See EMPLOYER AND WORKMAN. 9.

—— —— Sched. I., cl. 14 - - - 802
See EMPLOYER AND WORKMAN. 11.

—— —— Sched. I., par. 16; Sched. II., par. 9 66, 73, 640
See EMPLOYER AND WORKMAN. 6, 16, 17.

—— —— Sched. II. (4) 791
See EMPLOYER AND WORKMAN. 14.

—— —— Sched. II., cl. 9 (*a*) - - 77
See EMPLOYER AND WORKMAN. 23.

1907.

7 Edw. 7, c. 23, s. 4, sub-s. 3—*Criminal Appeal* - - - - - - 24
See CRIMINAL LAW. 1.

1908.

8 Edw. 7, c. 69, s. 120—*Companies Consolidation* - - - - - - - 368
See COMPANY.

STAYING PROCEEDINGS — Company — Arrangement with creditors—Judgment
See COMPANY. 368

STEPFATHER — Workmen's compensation — Illegitimate child - - - 521
See EMPLOYER AND WORKMAN. 8.

STREETS—Buildings.
See under BUILDING.

SUMMARY JURISDICTION.
See also under JURISDICTION.

1. —— *Separation Order—Order for Maintenance of Wife—Non-payment by Husband—Absence of Evidence of Means—Committal to Prison—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *ss.* 5, 9.
Where an order of justices is made under the Summary Jurisdiction (Married Women) Act, 1895, ordering a husband to pay to his wife a weekly sum by way of alimony, although the justices ought to have evidence before them of the husband's means at the time of making the order, if he fails at any time to comply with that order, while it stands unvaried and undischarged, they have jurisdiction to commit him to prison for such non-compliance notwithstanding that they have no evidence of his means at the date when the payment accrued due. THE KING *v.* RICHARDSON - - - - Div. Ct. 851

SUNDAY — Distress for rent — Rent due on Sunday—Legality of distress levied on following Monday - - - 753
See LANDLORD AND TENANT. 2.

—— Licensing Acts—Christmas Day and Good Friday - - - - - - 104
See LICENSING ACTS. 3.

—— Mayor's Court—Practice—Notice of appeal —Service on Sunday - - - 100
See MAYOR'S COURT.

SURGEON—Workmen's compensation—Seamen—Industrial diseases—Certifying surgeon - - - - - - - - 529
See EMPLOYER AND WORKMAN. 18.

SURGICAL OPERATION—Workmen's compensation - - - - - - 51, 54
See EMPLOYER AND WORKMAN. 21, 22.

SUSPENSORY ORDER—Workmen's compensation - - - - - - - 66, 529
See EMPLOYER AND WORKMAN. 16, 18.

TAXATION—Costs.
See under PRACTICE.

TAXES.
See under REVENUE.

TEACHERS—Schools.
See under SCHOOLS.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

THEFT—Ship—Contract of carriage—Passengers' luggage—Theft by shipowners' servants - - - - - - 987
See SHIPPING. 4.

THIRD PARTY—Joint and several promissory note signed by husband and wife for debt of third party—Liability of wife
See HUSBAND AND WIFE. 1. 390

TIMBER HAULAGE—Extraordinary traffic—Staple trade of district - - - 845
See HIGHWAY.

TIME—Mayor's Court—Practice—Notice of appeal—Service on Sunday - - 100
See MAYOR'S COURT.

TRADE—Arbitrator to be member of trade association—Arbitrator not member of association—Qualification - - 948
See ARBITRATION.

—— Board of Trade.
See under BOARD OF TRADE.

—— Restraint of trade—Infant, Contract for benefit of—Severable stipulations—Injunction - - - - - - 235
See MASTER AND SERVANT. 2.

TRADE REFUSE—House or trade refuse—Restaurant—Removal of refuse—Public Health (London) - - - - 588
See LONDON. 5.

TRAMWAY—*Additional Expense imposed on Gas Company by reason of existence of Tramway—Liability of Tramway Company—Interruption of Tramway Traffic—Laying down, repairing, altering, or removing new Service Pipe—Repairing, altering, or removing Service Pipe or Main laid before Construction of Tramway—Connecting new Service Pipe with Old Main—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 32, *sub-ss.* 2, 5.

By s. 32 of the Tramways Act, 1870, "Nothing in this Act shall take away or abridge any power to open or break up any road along or across which any tramway is laid, or any other power vested in any . . . . company . . . . for the purpose of laying down, repairing, altering, or removing any pipe for the supply of gas . . . . but in the exercise of such power every . . . . company . . . . shall be subject to the following restrictions; . . . .

"(2.) Before they commence any work whereby the traffic on the tramway will be interrupted they shall . . . . give to the promoters . . . . notice of their intention to commence such work. . . . .

"(5.) Any company shall not execute such work so far as it immediately affects the tramway except under the superintendence of the promoters, unless they refuse or neglect to give such superintendence at the time specified in the notice for the commencement of the work . . . . and they shall execute such work at their own expense and to the reasonable satisfaction of the promoters: Provided that any additional expense imposed upon them by reason of the existence of the tramway in any road or place where any such mains, pipes, ... shall have been laid before the construction of such tramway shall be borne by the promoters":—

Held, that the proviso in sub-s. 5 of s. 32 applies so as to entitle a gas company to claim from a tramway company an additional expense imposed upon them by reason of the existence of the tramway, although the work in respect of which the additional expense is incurred does not cause an interruption of the tramway traffic within the meaning of sub-s. 2.

Held, further, that "additional expense" within the meaning of the proviso does not include the additional expense, caused by the existence of the tramway, of laying down a new service pipe for the first time since the construction of the tramway, nor of repairing, altering, or removing it; but that it does include the additional expense of connecting a new service pipe with a main (involving the drilling of a hole in the main) laid before the construction of the tramway, and of repairing, altering, or removing any service pipe or main laid before that time.

A gas company executed certain work in laying and repairing their service pipes and mains. In one instance during the execution of the work, where there was a double tram line, the cars of one line were diverted to the other line, and the up and down cars were both carried over the same line for a whole day, such diversion being made at the request of the gas company for the purpose of enabling them to repair a fractured main which was causing a serious escape of gas.

In all the other instances the tramcars were either slowed down or only brought to a standstill for a sufficient time to enable the workmen of the gas company to get out of the trenches under or near the tram lines where they were at work on the pipes of the gas company.

Flags and danger boards were put up by the gas company to warn the tram-drivers of the fact that men were working in the trenches, and in some cases additional watchmen were employed by the gas company to warn their workmen of the approach of trams:—

Held, that these facts constituted in law an

TRAMWAY—*continued.*
"interruption" within the meaning of sub-s. 2 of s. 32. *In re* BRISTOL GAS COMPANY AND BRISTOL TRAMWAYS AND CARRIAGE COMPANY **Phillimore J. 297**

—— Common carrier of passengers—Negligence —Liability for personal injuries - **858**
See CARRIER.

TRESPASSERS—Savage animal—Scienter—Liability of owner to trespassers - **433**
See SAVAGE ANIMAL.

TRIAL — Abortive — Practice — Rehearing — Evidence on former hearing—Evidence on rehearing - - - - - **14**
See CRIMINAL LAW. 8.

—— County court—New trial, Jurisdiction of judge to grant - - - - - **573**
See COUNTY COURT. 3.

TROVER—Partridge eggs, Seizure and detention by police officer of—Liability of police officer in trover - - - - - **415**
See GAME.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

UNDERLEASE — Lease — Forfeiture—Relief — Writ claiming possession—Election to determine tenancy—Effect on underlease - - - - - - - - **894**
See LANDLORD AND TENANT. 3.

UNDUE INFLUENCE—Influence of husband—Absence of independent advice — Liability of wife . - - **390**
See HUSBAND AND WIFE. 1.

WATER-CLOSETS.
See under PRIVIES.

WEARING APPAREL—Married woman—Judgment debt—Wife's separate estate—Paraphernalia - - - - - **831**
See HUSBAND AND WIFE. 2.

WIFE.
See under HUSBAND AND WIFE.

WORDS—"Accident" - - - - - **798**
See EMPLOYER AND WORKMAN. 2.

—— "Charges" - - - - - - **998**
See SHIPPING. 2.

—— "Contractor" - - - - - **516**
See EMPLOYER AND WORKMAN. 15.

—— "Dependant" - - - - - **521**
See EMPLOYER AND WORKMAN. 8.

—— "Fancy bread" - - - - **610**
See BREAD.

—— "Landlord" - - - - - **127**
See LONDON. 4.

—— "New building" - - - - **257**
See LOCAL GOVERNMENT. 1.

—— "Ready for loading" - - - **929**
See SHIPPING. 3.

—— "Seaman" - - - - - - **36**
See EMPLOYER AND WORKMAN. 20.

—— "Seaman" - - - - - - **811**
See MASTER AND SERVANT. 1.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION RULES, 1907 **791**
See EMPLOYER AND WORKMAN. 14.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.

BIBL. LONDIN UNIV

UL 12 OCT 1973